

R E P O R T S

OF THE

PROCEEDINGS IN COMMITTEES

OF THE

HOUSE OF COMMONS,

UPON

CONTROVERTED ELECTIONS.



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R E P O R T S

OF THE

PROCEEDINGS IN COMMITTEES

OF THE

HOUSE OF COMMONS,

UPON

CONTROVERTED ELECTIONS,

HEARD AND DETERMINED DURING THE

PRESENT PARLIAMENT.

V O L. I.

Containing the Proceedings on PETITIONS in the first Session of
this PARLIAMENT, in the CASES of

PONTEFRACT,
IPSWICH,
MITCHELL,
DOWNTON,



BEDFORDSHIRE,
COLCHESTER,
AND
ILCHESTER.

By ALEXANDER LUDERS, ESQ.

BARRISTER at LAW, of the INNER-TEMPLE.

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MDCCCLXXXV.

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CASE I

1. The first case is a case of a man who was born in 1800 and died in 1850. He was a farmer and a merchant. He was married to a woman who was born in 1805 and died in 1860. They had four children: a son who was born in 1820 and died in 1870, a daughter who was born in 1825 and died in 1875, a son who was born in 1830 and died in 1880, and a daughter who was born in 1835 and died in 1885.

CASE II

2. The second case is a case of a man who was born in 1810 and died in 1860. He was a farmer and a merchant. He was married to a woman who was born in 1815 and died in 1865. They had three children: a son who was born in 1830 and died in 1880, a daughter who was born in 1835 and died in 1885, and a son who was born in 1840 and died in 1890.

CASE III

3. The third case is a case of a man who was born in 1820 and died in 1870. He was a farmer and a merchant. He was married to a woman who was born in 1825 and died in 1875. They had two children: a son who was born in 1840 and died in 1890, and a daughter who was born in 1845 and died in 1895.

CASE IV

4. The fourth case is a case of a man who was born in 1830 and died in 1880. He was a farmer and a merchant. He was married to a woman who was born in 1835 and died in 1885. They had one child: a son who was born in 1850 and died in 1900.

TO THE
RIGHT HONOURABLE
ALEXANDER,
LORD LOUGHBOROUGH,

LORD CHIEF JUSTICE OF HIS MAJESTY'S COURT
OF COMMON-PLEAS.

MY LORD,

I Beg leave to solicit your Lordship's protection to a Work, which, if the writer's abilities were equal to the subject, might be useful to that Profession, of which your Lordship is a distinguished ornament.

When I consider how nearly connected the Law of Elections is with the freedom of Parliament, and that your name is conspicuous in that illustrious number, who formerly supported, with so much spirit and perseverance, the constitutional freedom of election, I flatter myself, there is peculiar propriety in my requesting your fa-

DEDICATION.

vourable notice of an endeavour to ascertain the principles by which that law is administered.

Though your Lordship is now raised above the sphere within which the Election Judicature is exercised, I have no doubt but that the same talents which led to this elevation, will at all times maintain an institution so necessary to the freedom of Parliament; that if it should be thought necessary to propose any additional improvements to the new Tribunal, they will find in the House of Peers an able and enlightened supporter in your Lordship; and that the same care with which your Lordship protected its first beginning, will attend its progress to perfection.

I have the Honour to be,

Your LORDSHIP'S most obliged,

And obedient Servant,

Inner Temple,
January 26, 1785.

Al. Luders.

P R E F A C E.

THE public benefit derived from the operation of Mr. Grenville's act is universally acknowledged: A numerous series of decisions made in the judicature created by that law, has introduced a system of order into the trials of elections; and the experience of fourteen years has reconciled to the institution, some of those who were formerly most adverse to it. But the effect of these decisions would be very limited, and gradually lost, if memorials of them were not recorded and preserved. The public is on this account much indebted to Mr. Douglas for having engaged in the task of reporting the proceedings of election Committees: His valuable work contains many examples of the good effects of the new judicature, and leaves us to regret that his place was not supplied in the sessions next after the general election in

1780. The contests of that year gave rise to many important questions of election law, and to many wise decisions upon them, the good effects of which are, I fear, chiefly confined to the parties concerned. The few Cases of this period that have been published by Mr. Philips, contain a very small part of the number then determined.

The general use and reputation of Mr. Douglas's collection encouraged me to report the Cases of controverted elections, determined in the present Parliament. The following work is only the first part of my undertaking, and contains the Cases of the last session. If its reception with the public should be favourable, I shall continue it. My object in attending the Committees was, from the beginning, to publish their proceedings : I am therefore answerable to my readers for the errors they may discover in a book that was always intended for public use. In the execution of it, I have generally followed the method practised by Mr. Douglas, because it seemed to me the fittest possible for the subject; and I acknowledge my obligations to him for having marked out so just a course in ways

—————*nullius ante*

Trita solo —————

and where some guide was wanting to supply the place of experience.

I hope

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I hope no person will be led by the foregoing passage to draw a comparison between the two publications; it must be too obvious that mine will suffer by it. However, I can assure those who have been used to expect satisfaction to their researches in books of this sort, that I have spared no pains (as far as time would permit) to be correct. By the indulgence of the counsel and agents in the several causes, I have had an opportunity of comparing my own notes with their papers, and of reviewing the several subjects in conversation where any doubts required it: I have also been favoured with a perusal of the clerk's minutes: And to all I take this opportunity of acknowledging my obligations.

Wherever reference has been made to cases in the Journals or Law books, I have always examined them myself; and I can venture to say that there is not a single reference to any of them in the following compilation, which I have not perused, in order to state with accuracy. Where the subject has led my inquiries further, I have subjoined the result of them in my notes at the end of each case.

I have been less minute in stating the formal parts of the proceedings, because Mr. Douglas's work has already published full information upon that subject; and I have often taken the liberty to arrange the several matters of a cause
a little

a little differently from their original state; in the manner which seemed to me most proper for understanding the principal question.

Although several of the Committees of the last session were sitting at the same time, yet it generally so happened that no two points of argument were at the same time going on in two together; where I was not able to hear the *evidence* in all, I read the clerk's minutes afterwards.

With respect to the CASES of this volume, it may be useful to give some preliminary account.

I am sensible that my report of the CASE of PONTEFRACT will by many be thought unsatisfactory. In the beginning of it I refer the reader to Mr. Douglas's report of the same case; and in fact I consider mine as only an appendix to his. This Committee being the first of the Session, and sitting only three days, concluded their inquiry before any other was opened; on this account it engaged my whole attention, and it was then my design to have given a full state of it: I have altered that opinion since, not from indolence, but from a full consideration of the subject, which induced me to make the observation in page 4. of this Case, and to act accordingly.

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I believe the CASE of IPSWICH is the first under the new judicature, in which the merits of the election have depended solely upon the statute 7 & 8 Will. III. ch. 4. (called the Treating Act): It has also this advantage, (besides that of containing a question of bribery, simple and unqualified) that the facts of the case were chiefly admitted, and occasioned little or no dispute between the parties. In most of the cases of general bribery, the question has either been involved in disputed facts, or has been mixed with other questions upon which the parties have advanced their claims concurrently.

It often happens in the trial of elections, that the grounds of the decision are not ascertained: This defect, it must be owned, is almost peculiar to that jurisdiction in which they are tried, and materially obstructs their use as precedents. If this fault should be imputed to the CASE of MITCHELL, I am apt to think I should not have mended it, by stating the proceedings more at length, in order to have enabled the reader to have formed conjectures upon what the principle of the decision may have been; or if I had ventured my own conjectures upon the same basis. But such cases sometimes contain other useful matter leading to the final resolutions: And although the task of reporting them may
be

be irksome, and their use contracted, they do not thereby prevent the attainment of substantial justice to the parties.

Almost every question that can arise in boroughs of burgage-tenure, was agitated in the **CASE of DOWNTON**. All those upon which precise determinations were given, I have endeavoured to state correctly and distinctly.

It would be in me a great presumption, to give any opinion upon those determinations; but I cannot let my account of this case go forth to the public, without paying my tribute of applause to the members of this Committee; for the diligent and deliberate attention with which they persevered so long, through a tedious, uninteresting, legal inquiry; for the distinct decisions they gave upon every question, and for the anxiety they shewed upon all occasions to decide according to the best authorities. An example, so honourable, held forth in the beginning of a Parliament, if followed as it deserves, would produce in a short time all that is wanting to form a code of parliamentary law.

The **CASE of BEDFORDSHIRE** contains many useful arguments upon those technical distinctions which the usage of the House of Commons has raised in election petitions. The decision
of

of this Committee has extended the distinction of Cases relating only to the *Return*, further than any I have seen in the Journals. I have not had leisure to examine all those in which particular circumstances have furnished occasion for a previous inquiry into the Return; I believe there are more than thirty of this sort. Those I have seen, lead me to think, that the distinction was at first adopted upon no settled principle, and perhaps to serve a turn; and that the probable loss of the distinction by extending its application, will be a consequence beneficial to the law of Parliament.

The legal principle of distinguishing between the *right* and the *possession*, to which the parliamentary proceeding is said to be analogous, is a just one in Westminster-hall, and its exercise there is consistent with the principle; because by the rules of law flowing out of the feudal system, different forms of *real* actions are instituted for obtaining justice; and a regular body of law has been established (whether the cause or the effect of these forms I know not) adapted to these several actions. But in a judicature where in only one form of obtaining justice is practised, and where the suit is confined to one object, there can be no good reason for maintaining this distinction; it tends only to double the suit, or at least to divide it for the purpose of obtaining

obtaining the same end in two several ways : Whereas in the legal suit the objects of the several actions, are essentially different. But, in another point of view, this analogy is quite out of the question ; when it is considered that the distinction of *right* and *possession* is applied to a subject which ought not to be regarded as a *property* in any shape, but merely as a *service* of representation.

But, further,—the practice of the House of Commons upon this subject is inconsistent. In double returns, there is certainly stronger reason for enforcing the distinction than in any other cases ; yet in them it is not so practised. The distinction exists, it is true, but never occasions two causes ; it may occasion two different inquiries in the same cause (of which the case of Downton is an instance) and may oblige the parties to change their formular characters in the suit ; but it extends no further. It is remarkable, that before the stat. 10 Geo. III. ch. 16. when the House exercised an arbitrary power in the trial of elections, they very seldom practised this distinction in double returns. The whole case was generally referred to the Committee of privileges and elections, who considered the whole as *one* cause, though they sometimes made partial reports to the House, in the manner of interlocutory judgments, in the course
of

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of their proceeding. But this was in compliance with the fundamental principle of representation, *that the House shall be full*, and that of two sets of members for the same place, the House might not lose the service of both.

The CASE of COLCHESTER is curious, because it is the first of its kind. The question is unmixed with fact, and the determination expresses a legal opinion upon the orders of the House relating to the qualification for a seat in Parliament. There was an inaccuracy of expression in the final resolution of this Committee that gave occasion for censure: It is much to be wished, that these matters of form were so framed, as to secure them from objection in the House. The neglect of this formality tends to give the House at large an authority in controverted elections, from which, it certainly was the object of Mr. Grenville's act to exclude their most indirect interference.

With respect to the CASE of ILCHESTER, I have little to say; perhaps I ought to apologize for inserting an account from whence so little of the cause can be collected; but the nature of the case must be my excuse. As my principal object in compiling these Reports, has been to make them of professional use, I have omitted

in all of them, such details of evidence and arguments, as did not lead to a precise understanding of the decision. Some readers will perhaps hereby complain of the loss of several useful and able arguments of counsel, and the curiosity of others may be disappointed in searching for the history of an election: But I could not gratify either, without risking the censure of those for whose use my labours were chiefly intended.

I have thus gone through the several cases now presented to the reader: Whatever views of personal advantage I might have in this publication, I am willing to believe that another and higher motive has had some share in directing it. The just and impartial administration of justice in the decision of those claims, which give a voice in the favourite seat of our Legislature, is deeply interesting to every English subject. A principal means of attaining this end, is to preserve memorials of those decisions. Although the constitution of that tribunal of which I am writing is such, that precedents cannot, from their nature, have the same authority as in other courts of justice, still they must have their use; for according to the respect paid to them, will the authority of the Court be respected by the people. Power alone will not have this effect; it must be gained by degrees,

degrees, as the regularity of system becomes established; to which a conformity of judgments is absolutely necessary.

It is not to be wondered at, that in the beginning of any institution, its proceedings should be irregular; instances of this have often happened in election Committees; the case of Pontefract is a remarkable one. But I am so far from thinking the number great in which a contrariety of opinion shews itself, that I rather wonder there are so few. It is in my mind extraordinary, that the short experience of fourteen years should have produced so much regularity. A long course of ages, together with a total separation of law from fact, and the advantage of special pleading to ascertain the point in judgment, were not able to preserve our ordinary courts of justice from continual clashing and contradiction, till within a century past. Every one conversant in our law reports, must have observed, how little certainty prevailed in the common subjects of litigation in Westminster-Hall, till the latter end of the last century.

The unsettled state of our government, and the dubious station of the judges in former periods, contributed to this, no doubt: But now that both these are durably fixed, and the ordinary administration of justice is become certain and uniform, what should prevent the same

uniformity from communicating to every branch of the judicial system?

In our constitution, the administration of justice is an integral part. Although that branch of it which belongs to Committees of the House of Commons, is separated from the general system; yet as it gives admission into one order of the legislature, it is intimately connected with the constitution, and ought therefore to be directed by constitutional principles. How important then is the duty to which members of the House of Commons are called in the exercise of this judicature? To preserve and strengthen the spirit of the statute by which it was created, should be a primary object with every man who wishes to secure the freedom of Parliament. A sense of the benefits resulting from a collection of the decisions in this judicature, operated strongly upon my mind; and induced me, though unequal to the task, to undertake it, when declined by others of greater abilities.

Mr. De Lolme, in his admirable book upon the English constitution, calls Mr. Grenville's Act "*one of those victories which the Parliament, from time to time, gains over itself; in which the members, forgetting all views of private ambition, only think of their interest as subjects.*" There is no reason to fear that the same principle will not direct the additions which,

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which, it is said, are intended to be made to this statute in the course of the present session. I hope it will not be deemed presumption, if, upon this occasion, I venture to suggest a few hints for its improvement; whatever opinion they may raise of my judgment, I am conscious that they proceed from a good intention.

1. I have heard many persons object to that part of the institution of select Committees, which allows of Nominees. Perhaps the mode of nominating them by the parties is defective: But the institution itself seems admirably calculated for insuring the presence of some experienced persons in the court. Without it, a whole Committee, or the greater part, might often be formed of young members; more especially when it is considered that those members, (much to their honour) are the most regular in their attendance.

2. According to the statute in question (sect. 6.) no member who has voted at an election complained of by petition, can make one of the fifty-one members out of whom a Committee is chosen: It would be difficult in this manner to obtain a Committee for a Westminster election, in which city so many of the members reside and possess the right of voting. Hereby the bu-

sines of the House might be suspended many days. Thus the necessity of the case seems to require an exception in this instance to a very just regulation.

3. The power given to the Committees for preserving order and enforcing obedience is indirect, and to be exerted by means of a special report to the House for the purpose. If a witness should appear to be grossly perjured in their presence, they cannot send him to prison without applying to the House for an order: In the mean time the witness may run away and secrete himself. I am not aware of any objection to an exercise of the power of committing for contempts, directly, and in the first instance by the committee. I think they might be trusted with this power as safely as commissioners of bankrupts.

4. If the Committee should determine a petition to be vexatious and frivolous, they cannot redress the party grieved, otherwise than by a special report to the House. The method for obtaining satisfaction by a vote of the House is troublesome and uncertain; besides which, it tends to open the proceedings of the Committee to an examination in the House, and thus indirectly to give the House at large a jurisdiction

over

over the election. It seems to me that the Committee itself would exercise the power of awarding costs to the party grieved, with more regularity and satisfaction.

5. On those days which are appointed for the balloting for a select Committee, the House cannot previously enter on any business besides the swearing of members. It might be convenient to add to this exception, the receiving reports from other Committees, and giving the orders which they may require of the House for the conduct of their business. I have known some very injurious delays occasioned by the want of an opportunity to make particular reports to the House on those appointed days, when the House has adjourned for defect of members.

6. Although no bad consequence has yet happened from the regulation of sect. 24. of the statute, whereby, 'in case the members of the Committee be reduced unavoidably by death or otherwise, to a number less than thirteen, and so shall continue for three sitting days, the Committee becomes *ipso facto* dissolved and all its proceedings void;' yet I cannot help thinking it would be proper to moderate the rigour of this clause. In the course of a long trial (in which

the inconvenience would be the most severely felt) this dissolution might easily happen. In the case of Worcester it was very much apprehended, when the inquiry, which had lasted seven weeks, was near concluding *. I should think the parties in such case would prefer the inconvenience of a contracted number of judges, to the enormous expence of renewing a long contest.

7. During the present state of parties, and while 'griefs are green,' it might be dangerous to enter upon such an improvement of the statute, as the Westminster Petition in the beginning of this Parliament shews to be necessary. It cannot be denied, that the first principle of the statute and the main design of its author, were to exclude the House at large from the cognizance of elections. The unprecedented return for this city has at once set aside the act: At least, the Court to which the right of interpretation belonged, understood it so. The operative words of the first section of the statute being "election or return *of a member*," it was said that as no "*member*" was returned, the statute had no operation. Yet when these words are compared with those of the 18th section, "the Committee—shall try the merits of the *return*, or election, or both"—a different construction seems capa-

* See 3 Doug. Elect. 380.

ble of fair argument. This circumstance restored the old jurisdiction in some measure to the House, at a time of all others most unfit for it; when the ferment of parties was at the highest, and particularly directed to the point in question.

The constitutional freedom of Parliament calls for some method of rescuing Mr. Grenville's act from the *veto* of a returning officer.

The consequence of this interpretation has produced a nugatory Court of Ease to the election judicature, in which the changes of three seasons have passed away in unremitted contest, without effecting any real change in the state of the election; and leave the candidates in the beginning of a second session, in the same uncertainty with which they began the first.

8. It is much to be wished that some method were taken to prevent a declaration of the opinion of the House upon election petitions, before they are duly opened in the proper judicature. The Case of Bedfordshire will certainly suggest a proper remedy for this defect: But on this subject too, I am fearful to enlarge, for the reason above said to be applicable to the case of Westminster,

9. It must have occurred frequently to those who have attended election Committees, that
 3 many

many questions are agitated in them depending on mere points of the Common law, sometimes intricate and abstruse: The Case of Downton in this volume is of this sort, and contains many legal points, not immediately the objects of election law. Now it cannot be expected that members chosen indifferently out of the House of Commons, can be equal to the right determination of such questions, however desirous they may be of doing justice. It is unfortunate that a remedy which seems most likely to obviate this inconvenience, should militate against a fundamental maxim of the House of Commons. I mean, a proposal for empowering the Committee, when they may want assistance in points *merely* of Common law, to state a question in writing to the judges of either court of Westminster-hall; or, out of term time, to either Chief Justice, for their opinion.

The objection to this mode of proceeding, may be thought too strong to be passed by. It may be said, the Commons have always entertained a well-founded jealousy of the interference of third parties with their privileges, and ought not to deviate from this principle. Others who judge from present experience may think this reasoning ill-timed; as being founded in a maxim framed in former times, the circumstances of which made it necessary, and to which

it

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it was peculiar, to a state of things totally different. At a time when the House of Commons is at least as powerful as either of the other orders of the state, it seems idle to talk of the fear of their privileges being invaded.

All nations, communities, and societies are apt to fall into the error of acting upon old maxims of conduct, because they are antient, when the circumstances that first raised them exist no longer. The maxim in question was wise, and necessary to the representatives of the people, in the last century; their rigorous adherence to it tended to raise them to their present dignity: Its principle ought never to be departed from. But to exert it in matters of mere form, cannot, surely, add to its security, and may prevent the acquisition of many salutary improvements. It can hardly be pretended that any real danger can happen to the privileges of the House of Commons from the alteration proposed; and I should hope that in this age of liberal sentiment, no benefit will be rejected merely from a ceremonious regard to forms. The privileges of the House of Commons were not thought by Judge Blackstone (himself once a member) any obstacle to a proposal recommended by him, for formal consultations of the Judges by the House itself upon their passing bills.

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Persons not versed in parliamentary history, who judge of the House of Commons by their own experience, will hardly believe that the name originally given to the election Committees was occasioned by their being obliged to contend for the liberty to try their own elections; a right which the King and Lords at that time denied them, and therefore they called the court *καὶ ἐξουχίαν* “a Committee of *privileges*.”

Many of those disputes which in the last century disturbed the whole tranquillity of the state, are not interesting enough to engage even the curiosity of the present generation. But the effects of them remain in daily practice, in forms and ceremonies almost unobserved by the persons who are continually engaged in them. Thus the Commons in the beginning of every Session, still appoint a grand Committee for *Religion*, a second for *Grievances*, a third for *Courts of Justice*, and a fourth for *Trade*, to sit regularly four days in the week; though I believe very few besides the Speaker and Clerk of the House, know that such Committees exist.

10. Perhaps the present and next following observation, may be thought to relate more properly to the orders of the House, than to the statute. I believe in every session next after a general

general election, groundless petitions have been presented, merely for the purpose of blocking up seats; for no member can vacate his seat, when his election is complained of by petition. The petitioners in such case run the chance of a subsequent compromise, or of the expiration of the session before their appointed day arrives. The prospect of a resolution determining the petition to be vexatious, is too remote to prevent this evil: Perhaps it might be prevented by making an order, empowering the sitting member to call upon a petitioner under suspicious circumstances, to give security for the costs in case of a future resolution of vexation; or to renew his petition in the subsequent session, if not heard in the first. The House has expressly resolved, that a petitioner may be a candidate for any other place; in which respect he has an advantage over the sitting member petitioned against.

II. There is a resolution of the House annually passed, whereby lists of voters objected to must be mutually exchanged between the parties in *county* elections; the principle of this regulation extends equally to boroughs, of which some contain a greater number of voters than many populous counties. I have heard
of

of cases in which the order has been evaded by delivering lists of double or treble the number of persons really objected to. It might be proper, not only to extend the rule to boroughs, but also to empower Committees to punish an evasive compliance with it, by an allowance of costs to the party grieved. There are instances in the Journals, in which the House has made an order for the exchange of lists in *borough* elections, and has insisted upon a *bonâ fide* obedience to it; as in the case of Harwich, 8 June 1714. in 17 Journ. 672.

I fear I should justly incur censure, if with my slight experience, I were to extend my observations further. The foregoing are a few only of those which have occurred to me on this subject. I have ventured to state them with the more confidence, because they are not my opinions alone, but those of others to whose authority respect is due.

As I have said before, some time must necessarily elapse before this new Institution can form a regular system for its direction. In the mean time nothing can tend so effectually to give dignity and respect to it, as a regular attendance of the members. The service on election Committees is often difficult, and sometimes burthensome;

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some; but the labour must be amply repaid to a generous mind, by reflecting, that a proper discharge of it, tends more than any other, to strengthen that branch of the legislature from which the constitution has deriyed all its force and beauty.

Jan. 25, 1785.

ERRORS OF THE PRESS.

- Page 44. line 17. read *by which this*
101. line 5. from the bottom, read *illustrations of*
148. line 19. read *Devises*
157. line 6. read *in possibility only*
253. line 2. from the bottom, read *grantor*
254. line 3. from ditto, read *grantor*
299. line 18. read *Kaims's*
348. line 1. read *amendment there,*

At the bottom of Page 263. add the following reference, viz.
See the Case of Cardigan, 3 Doug. Elect. 188, 206. and the following pages.

The Committee was chosen on Thursday, the 18th
of June, and consisted of the following members:
Sir William Lubbock, Bart. Chairman.

Lord Alford.
Sir James Lambton, Bart.
William Widdowes, Esq.
Hon. John Lubbock, Esq.
Charles T. Atterbury, Esq.

Richard D. Smith, Esq.
Sir Thomas Lubbock, Bart.
Henry Darnley, Esq.
Robert T. Atterbury, Esq.

I.
THE
C A S E

Of the BOROUGH of

P O N T E F R A C T,

In the County of YORK.

The Committee was chosen on Thursday, the 18th of June, and consisted of the following Members :

Sir William Leman, Bart. Chairman.

Lord Apsley.

Sir James Langham, Bart.

Watkin Williams Wynne, Esq;

Hon. John Somers Cocks.

Clement Tudway, Esq;

Lionel Darrell, Esq;

Sir Edward Littleton, Bart.

Harry Burrard, Esq;

Robert Fanshawe, Esq;

Lord Compton.

Right Hon. William Pitt.

Penn Aethon Curzon, Esq;

NOMINEES,

Of the Petitioners,

Lord Mulgrave.

Of the Sitting Members,

Right Hon. William Windham Grenville.

PETITIONERS,

Hon. William Cockayne, and John Walshe, Esq; and
certain Electors of the Borough of Pontefract.

Sitting Members,

John Smyth and William Southeron, Esqrs.

COUNSEL,

For the Candidates Petitioners,

Mr. Wilson and Mr. Piggott.

For the Electors,

Mr. Chambre.

For the Sitting Members.

Mr. Cowper, and Hon. Mr. Erskine.

[3]

T H E

C A S E

Of the BOROUGH of

P O N T E F R A C T.

WHEN the Committee met on Friday, the 9th of June, the petitions were read *; as they originated with the party opposite to those who had been the petitioners in the preceding contests for this borough, they set forth the contrary claim to that of the former petitions; but, the question was the same, and was so considered by the counsel in their arguments; in which they endeavoured to enforce and illustrate those formerly employed. As these are fully stated in Mr. Douglas's Report † of the case of Ponte-

* See Votes 25 May, p. 28, 29.

† 1 Doug. Elect. 379.

fract, I have thought it more proper to omit a particular account of them, than to fill my pages with matter which must look like a repetition of what the public has already received from an abler pen. The circumstances of the case, as delivered in evidence, were the same (with an exception of no great moment hereafter mentioned) and the conclusion was drawn from the same premises.

The decision of the Committee who tried this cause in 1775 (A), having confirmed the burgage right of voting, that right was not disputed at the general election next following in 1780; but a vacancy having happened in the beginning of the year 1783 *, the election to supply it†, was contested by two candidates upon the strength of the two interests, which had contended in 1774; Mr. Nathaniel Smith, who stood upon the burgage right, was returned to Parliament; Mr. John Smyth,

* Lord Gallway, one of the members, took the Stewardship of the Chiltern hundreds, in order to vacate his seat.

† It came on February 13th, 1783.

who

who stood upon the right of the inhabitants, petitioned against his election ; the committee who sat upon this petition, determined * in favour of the petitioner and of the inhabitants, i. e. contrary to the determination of the former Committee. At the last election the same interests contended again ; three candidates stood upon the right of the inhabitants, Sir Rowland Winn, and the two members returned ; and Mr. Walsh and Mr. Cockayne upon the burgrave right. The numbers on the poll were, for

Sir R. Winn	167	} voting as inhabitants.
Smyth	362	
Southeron	197	
Walsh	128	} voting as burgrave tenants.
Cockayne	128	

After the reading of the petitions, when the counsel for the petitioners were preparing in the usual course to address the Committee, the parties were directed to withdraw, and when called in again, were asked by the chairman, “ If the entries in

* See Votes 11 April 1783.

the Journals of the 28th of May * 1624, and 6th of February † 1770, were to be read ‡:” It was hereupon agreed by the parties, that in order to prevent confusion in the arguments, both the above resolutions should be read without prejudice to the question, and without reading the standing order of 16 Jan. 1735-6, that the whole case on each side might be considered at once.

The entries concerning the resolution of 1624, were read and compared with the original manuscript Journals, by a gentleman conversant in that sort of writing of which they were composed §: both were found to agree (B).

That part of the evidence in which the present case differed from that decided in 1775, was in the indentures of returns to Parliament, and in the testimony of the mayor and town-clerk of the borough: In 1775, a series of returns (C) was produced from the earliest times, but the re-

* 1 Journ. 714. 797.

† 32 Journ. 655.

‡ See 1 Doug. Elect. 380.

§ See 1 Doug.

P O N T E F R A C T. 7

turn of that election which followed the determination of the House in May 1624, was not then to be found in the proper office; and not being produced, it was from thence inferred in argument, that this return might probably contain some evidence of the right contended for by the inhabitants; and that therefore the argument drawn from the form of the returns to their prejudice, had not a sufficient foundation. This return had been since found in the Rolls chapel, and was now produced to the Committee: It is dated in 1625, and is in the same terms with the others of that period, purporting to be made by "the mayor, aldermen, and burgesses (D)."

Some doubt was hinted from the Committee, whether this return, made so long after May 1624, was that of the election *next* following the resolution then passed; the counsel for the petitioners said, that no election took place in the session in which the cause was decided, for the Parliament was prorogued on the 29th, the day after the resolution of the House; in the inter-

val, the King's death occasioned a dissolution *, and the return in question was that to the new Parliament, summoned by Charles I. upon his accession.

The return to the present Parliament was produced, which states the election to have been made by the *inhabitants*, and is the first return for Pontefract in which the word *inhabitants* occurs.

Mr. Seaton the mayor, and Mr. Hepworth the town clerk of Pontefract, were examined on the part of the petitioners, in order to shew the constitution of the borough; from them it appeared, that the corporation consists of mayor, aldermen †, and burgesses; that by the word burgess, they understand "a person possessed of a freehold of burgage tenure," which burgages amount to about 320 or more; that the aldermen are

* This Parliament never met again, but was continued by different prorogations till the King's death, which happened on the 27th of March 1625; the new Parliament of Charles I. was summoned to meet on the 7th of May following.

† Called *Comburchenses* in the charters.

P O N T E F R A C T . 9

chosen out of the burgesſes, according to the direction of the charters (E); that none but the corporation derive or claim any benefit from the rents belonging to them; that the corporation poſſeſs at this day certain market ſtalls or ſheds, which were granted to the burgesſes of Pontefract by Henry of Laſci, earl of Lincoln, in 1268 (F).

When the counſel for the petitioners were going to call witneſſes, to prove that none but burgage tenants ever claimed to vote at elections before the year 1768, the counſel on the other ſide ſaid, they would admit this fact as far as any living witneſs could prove it.

On one ſide the minutes of the Committee, which ſate upon this queſtion in 1775 *, were read in evidence; and on the other

* This Committee, before they came to the reſolution upon the election, paſſed the following, “ That the
“ counſel be called in, and reſtrained from offering any
“ evidence touching the legality of votes for members
“ to ſerve in Parliament for the borough of Pontefract,
“ contrary to the laſt determination of the Houſe of
“ the 6th of Feb. 1770.” When the counſel were
informed

other side the minutes of the Committee of 1783.

On Friday the 11th of June (on which day the counsel finished their arguments) the Committee

Resolved, That the resolution of 1624 is a last determination, under the act of 2 Geo. II. ch. xxiv. s. 4.

After which they resolved, That the fitting members were duly elected *.

informed of this, Mr. Lee for the then petitioners told the Committee, that he had nothing further to offer on their part. After which, the Committee proceeded to determine, that the fitting members were duly elected. The subsequent Committee in 1783, came to no previous resolution.

* See Votes, June 11, p. 190.

N O T E S

ON THE CASE OF

P O N T E F R A C T.

PAGE 4. (A) The petition of the burgesſes electors, recited in the votes of 25 May, 1784. p. 29. ſets forth the hiſtory of the late conteſts for this borough. —“ That upon a conteſt in 1768, the return having been made by the freeholders of burgage tenure only, agreeable to the conſtitution and uninterrupted uſage of the borough, an attempt was made for the firſt time by the then petitioners, and by perſons calling themſelves electors, to overthrow the right of election in the freeholders of burgage tenure, and to eſtabliſh a right in the inhabitants, houſeholders, reſiants within the ſaid borough; and that the ſaid petition was heard at the Bar of the Houſe, on the 6th of Feb. 1770; and at the ſaid hearing, two obſcure entries in two Journals, of the 28th of May, 1624, different in expreſſion, were read, counſel on both ſides were heard thereupon, and the Houſe ſolemnly conſidered the ſame in a debate of many hours, when it was determined upon a diviſion of 161 to 32, that the ſaid two entries, appearing in two Journals of the ſame date, ſhould not be admitted to be read to the Counſel at the Bar as the laſt determination of the Houſe, touching the legality of votes for members

to

to serve in parliament for that borough; and thereupon the House permitted evidence to be offered to establish the right of election in the borough, and the counsel proceeded accordingly to give evidence, that the right of election for the borough of Pontefract is in persons having a freehold of burgage tenure within the said borough, paying a burgage rent; and that witnesses were examined, returns produced, and other evidence given, to prove the said right; and several entries in the Journals of the House, and reports from the Committee of privileges and elections, touching elections for the borough of Pontefract, were read; and the House, upon the whole, resolved, "That the right of election for
" members to serve in parliament for the borough of
" Pontefract, in the county of York, is in persons
" having, within the said borough, a freehold of burgage
" tenure, paying a burgage rent;" and that at the third election, which happened after the said resolution, viz. at the general election in 1774, the inhabitants, householders, residents within the said borough, in open defiance of that clear and recent determination of the House, repeated their attempt to overturn the ancient constitution of the said borough, and destroy the right of election therein, by claiming a right to poll, but their votes were rejected by the returning officer; a petition was, in consequence, presented against the sitting members, and referred to a select Committee of the House, when the first question before the said Committee was, whether the aforesaid entries in the two Journals of the 28th of May, 1624, or either of them, or the resolution of the House of the 6th of February, 1770, should be read, as the last determination of the House of Commons, touching the legality of votes for mem-

bers

bers to serve in parliament for the borough of Pontefract, within the intent and meaning of the Act of the Second of George the Second, Chapter the 24th; which question was solemnly argued by counsel on each side before the said Committee, who thereupon resolved, "That the counsel be restrained from offering any evidence touching the legality of votes for members to serve in parliament for the borough of Pontefract, contrary to the last determination of the House of the 6th of February, 1779;" and afterwards, upon the question, whether the sitting members, who had been returned by the freeholders of burgage tenure, were duly elected, decided the seats in their favour, conformably to the right of election established by the said last determination in the House of the 6th of February, 1770; and that at the next general election in 1780, all disputes concerning the right of election seeming to be at rest, there was no contest; and that, at an election for one representative in 1783, the dispute revived, a contest ensued, the return was made upon the burgage tenure votes only, in pursuance of the last determination in the House of the 6th of February, 1770, and the true constitution of the borough; a petition upon the claim of right in the inhabitants of the householders, resiants, was presented against the sitting member, and the select Committee, instituted upon that occasion, decided the seat in favour of the petitioner, rendering nugatory, in that instance, the last determination in the House of the 6th of February, 1770; from the time of which decision, to the late dissolution of parliament, the two representatives of Pontefract sat in the House of Commons upon two contradictory titles; and that in consequence of that success, the same persons renewed the same claim at the general election."——

P. 6. (B.) In the case of Pontefract, reported by Mr. Douglas (See his first vol. p. 397.) and again upon the present occasion, objections were raised against the resolutions of 1624, from the apparent inaccuracy with which they are entered in the journals, and from the loose manner of keeping the journals at that time. There are some entries of the proceedings of the house in that period, by which the effect of this objection may be removed; by them it appears, that the House paid considerable attention to the manner in which their proceedings were registered, and revised them frequently; so that it is not probable, that the clerk should have preserved any mistakes in the substance of their resolutions. The entries I allude to are in vol. I. p. 520, 673, 676, 683, 818, containing several orders of the House during the four last years of King James I. and first of Charles I. for inspecting their Journal; in the page first cited, a Committee of seven members is appointed "to survey the clerk's book weekly;" some of the persons named for this service, appear to have been assiduous men of business in that parliament; the next entry is of a similar Committee at the beginning of a session; in the third, it is referred to the Committee of privileges to examine the manner of keeping the Journals; in the fourth, this matter is referred to "the Committee for survey of the clerk's book," because the Committee of privileges have not time to attend to it; in the fifth, a Committee is appointed at the beginning of the session "to peruse the clerk's entries every Saturday." To an attentive observer of the Journals of this period, the informality of the entry of the resolution concerning Pontefract, will not appear singular: on the
same

same day (May * 28th) in which this resolution passed, Serj. Glanville made nine other reports from the Committee of privileges and elections, the account of which, and of their acceptance by the House, is given in a similar form to that of Pontefract.

P. 6. (C.) The forms of the returns are different, sometimes made by "mayor, aldermen, and burgessees," sometimes by "mayor and aldermen," sometimes by "mayor and burgessees;" in 1722 and 1729, by "mayor, recorder, aldermen and burgessees:" to many of the indentures the common seal of the borough was affixed. The earliest return extant, in the 26th year of Edward I. is a curious example of the change which the character of a representative has undergone: The sheriff of the county at that time returned all the members of his bailwick in a schedule annexed to the writ; in this schedule, Robert of Bonburg, and Thomas Scot are returned for Pontefract, *per manucaptors*; the sheriff could not trust them without pledges for their performing the burthenfome service imposed upon them. This form was not disused till the latter end of the fifteenth century.

P. 7. (D.) So many instances are to be found in the Journals, of the inaccuracy of those who used formerly to draw up the indentures of return, that we may readily assent to the observation of Serjeant Glanville, in his Reports, p. 35 †. "That the form of the indentures made in the country by ignorant persons, or transcribed peradventure from some borrowed precedent of another borough, where the election is different, are not conclusive to bind the parliament by any inference to be

* 1 Journ. 714, 797.

† See also his observation in p. 56.
made

made out of the same." This observation is justified both by antient and modern practice. In Windsor, where a dispute on the right of voting was kept up during almost the whole of the last century, between the corporation and the inhabitants at large, the inhabitants voted at an election in the third year of Charles I. yet the return to that Parliament was in the usual form of their returns, *by the corporation*, and under the common seal. See 10 Journ. 118, 254, 419. 9 Journ. 586, 646. 8 Journ. 292. 2 Journ. 47. Some of the returns, however, purported to be made by the burgesses and inhabitants.

In Aldborough in Yorkshire, the dispute was between the inhabitants at large, and a select number of the burgesses; and the House, 15th May, 1679, had resolved the right in favour of the former; yet the returns next after this resolution were made in the same form as before "by the burgesses." 10 Journ. 418.

In the case of Preston, before the select Committee in 1781, the return of Sir H. Hoghton and General Burgoyne, who stood upon the right of the inhabitants against the select number of burgesses, and were elected by them, was in the form of those preceding, "by the mayor, bailiffs, and burgesses," without any mention of inhabitants. So in some former elections for this borough, at which the *in-burgesses* voted, the return was by "the mayor and bailiffs" only, without any mention of the burgesses: there were nine returns in this form produced in evidence, from the beginning of the reign of George I. to the first of George III.

P. 9. (E.) Glanville, in his report of the case of Pontefract (p. 140), mentions a charter of Henry IV.

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to this borough, which, it was alledged in the argument on the present occasion, must have been a mistake, as no such charter existed; and that the charter he referred to was one of Henry the VIIth. Among the charters produced in evidence to the Committee, was one said to be by Henry VII. in the fourth year of his reign, and received as such; but upon my examining this charter afterwards (which I was enabled to do by the favour of Mr. Walsb) I found it to be, in truth, the charter of Henry IVth, mentioned by Glanville, and to have been recited as such by inspeximus in a charter of Edward VI. and another of James I. The mistake arose from an indorsement, in a very modern hand, on the paper in which it was wrapped, calling it "A charter of Henry VII." The royal stile * of both these kings being the same, and the charter not having the year of our Lord in its date, nor the numerical addition of the king, it might, *prima facie*, belong to either Henry. This king granted two charters to Pontefract in the same words, one in his capacity of Duke of Lancaster, (to which Dutchy the town belonged) and another, as King; the charter now produced, was that under the Dutchy seal.

It was inferred, by the counsel for the petitioner, from this supposed mistake of Glanville, that the subject then under the consideration of the Committee of which he was chairman, had not been very attentively examined, and that their conclusion reported by him, "*there being no charter nor prescription for choice,*" had been drawn from a misapprehension of the charters of the

* "Henry, by the grace of God, King of England and of France, and Lord of Ireland." But Henry VII. used to add the number to his name.

borough; but it appears that this Committee had inspected the above charter, and knew its contents.

P. 9. (F.) The words in which this grant is made, are these; “—— confirmasse dilectis burgenfibus & hominibus nostris de Pontefracto omnes feldas quas ipsi vel antecessores sui levare poterint in foro & vasto nostro ejusdem villæ usque ad festum apostolorum Petri & Jacobi ——” to hold to them their heirs and successors for ever, yielding yearly the accustomed farm.

II.

T H E

C A S E

Of the BOROUGH of

I P S W I C H,

In the County of SUFFOLK.

The Committee was chosen on Friday, the 11th of June (there being no House on the 10th for which it had been appointed) and consisted of the following members:

Alexander Popham, Esq; Chairman.
John Peach Hungerford, Esq;
Sir Robert Lawley, Bart.
William Colhoun, Esq;
William Willberforce, Esq;
Henry Duncombe, Esq;
John Thomas Ellis, Esq;
William Mainwaring, Esq;
John Moore, Esq;
George Bowyer, Esq;
Robert Colt, Esq;
Samuel Thornton, Esq;
William Pochin, Esq;

NOMINEE,

Of the Petitioner,

John Strutt, Esq;

Of the Sitting Member,

Sir George Howard, K. B.

PETITIONER,

Charles Alexander Crickitt, Esq;

Sitting Member,

John Cator, Esq;

COUNSEL,

For the Petitioner,

Hon. Mr. Erskine, and Mr. Piggott,

For the Sitting Member,

Mr. Cowper, and Mr. Rous.

T H E

C A S E

Of the BOROUGH of

I P S W I C H.

THE Committee met on Saturday, the 12th of June: The petition states, That Mr. Cator had by himself, or his agents, after the teste of the writ, been guilty of a most notorious and flagrant attempt to bribe the corporation of Ipswich to elect him, by offering a large sum of money to them for that purpose: That he had in the same manner been guilty of bribing the electors of the borough by promises of presents, and by treating; That one of the returning officers was an avowed agent of Mr. Cator, and did by his direction corrupt the electors to vote for him; in consequence whereof, many of

them did vote for him: That by these means Mr. Cator had procured an illegal majority of votes over the petitioner, who would otherwise have been elected and returned*.

The last resolution of the right of election in Ipswich was read; It is in 16 Journ. p. 478. 3 Feb. 1710.

Resolved, That the right of election of burgeses to serve in Parliament for the borough of Ipswich, in the county of Suffolk, is in the bailiffs, portmen, common council†, and freemen at large not receiving alms.

Then the standing order of 16 Jan. 1735-6, was read.

The state of the poll, as delivered in to the Committee by the town-clerk was, for

Middleton 460

Cator 297

Crickitt 7

No objection was made to the election of Mr. Middleton. By the opening of

* See Votes 25 May, p. 34.

† The Committee had used the word *Commonalty*, but when the House agreed to their resolution, this word was substituted in its stead without a division.

the case it appeared, that the petitioner endeavoured to avoid the election of Mr. Cator, by proceeding upon all the charges in the petition, and accordingly evidence was produced upon all of them.

Upon the first point the following facts were given in evidence :

The electors of this borough are two bailiffs, ten portmen, twenty-four common council men, and an indefinite number of freemen ; they have been for a long time divided into two parties, distinguished by the names of *blues* and *yellows* ; at the head of the former are the common council men, the latter is headed by the portmen. The yellows had been predominant at the late elections ; Mr. Wollaston, one of the late members, had been supported by them, and being abroad at the time of the late election, his brother, the Rev. Dr. Wollaston, proposed him as a candidate upon that interest. Mr. Staunton, the other late member, declined this election. Mr. Middleton was supported by the blues, on which interest he had failed in the last contest.

The last election happened on Saturday, the 3d of April: In the preceding week, the blues had proposed to the yellows to support Wollaston, if the yellows would support Middleton, and thus settle their differences; but this was rejected by the yellows, who then had hopes of carrying both members, and they persuaded Dr. Wollaston, against his own inclination, to join with Cator, whom they had invited to stand: about the same time, the portmen, who were told by Dr. Wollaston that he would spend no money in the election, asked him to withdraw his brother, which he refused. Cator was at this time a stranger to the borough. On the Monday before the election, Dr. Wollaston, by appointment, met Mr. Cator at the house of Mr. Cornwall, a banker in Ipswich and partner in that business with the bailiff Spooner. Here these three held a conversation about the election: Cornwall, who had before been told by Dr. Wollaston, that he would not spend more than 300*l.* on the election, and had communicated this to Mr. Cator, in this conversation
said

said to Dr. Wollaston, " he had estimated the expence at about 2000l. that Cator was willing to advance 1700l. of this sum, if Wollaston would answer for the remaining 300l." This being agreed to by the latter, Cornwall said, " if the expences were to be paid at his bank, he should expect a deposit of the money beforehand;" This was likewise agreed to, and then they went about the town on a joint canvas for Wollaston and Cator; on the same day Cator paid 1700l. into Cornwall's banking-house; on the next day, at Cator's desire, the above agreement was put in writing and signed; it is as follows:

" Mr. Wollaston, by Dr. Wollaston,
 " deposits 300l. in the hands of Messrs.
 " Alexander, Cornwall, and Spooner; and
 " John Cator having deposited 1700l. in
 " the same hands, for the purpose of pay-
 " ing the expences already incurred, and
 " which may be incurred, for their elec-
 " tion; and it is agreed, if the expence is
 " less than 2000l. all the money remain-
 " ing shall be returned to John Cator;
 " and if the expences exceed 2000l. all
 above

“ above that sum is to be paid in equal
“ portions by Dr. Wollaston and John
“ Cator. In witness whereof, they have
“ set their names this 30th March, 1784.

“ FRED. WOLLASTON.

“ JOHN CATOR.

“ N. B. If the expence does not amount
“ to 1200l. Dr. Wollaston is to have re-
“ turned the proportion of one to four.”

Dr. Wollaston in his evidence said, he had no knowledge of election matters, nor of the particular expences, or the manner in which they were incurred, in an election at Ipswich; he had heard that a great deal was incurred on account of the out-voters; and being told by Cornwall, that the expences of the former election had exceeded the above sum, he relied on his estimate, as he made it, without knowing how, in particular, the money was to be applied; but he understood it was for the necessary joint expences of the election, and not to be used for any purposes in which both parties were not concerned; and that no unlawful use would be made of it: Cornwall was to disburse the money, and
to

to return the remainder, if any, with an account; he wished the transaction to have been kept secret, though not from any notion of its being wrong, but found it was known to all his principal friends in the corporation.

In the course of the canvas, he perceived his brother's interest to have declined considerably, and hereupon determined, after consulting one or two private friends, to withdraw his name on being indemnified the expences at that time incurred; On the thursday before the election, at Cornwall's house, in the presence of Cator, Cornwall, Spooner, Notcote the town-clerk, and one or two more of the corporation, he said, he feared his brother's interest might fail, and asked them "*If Middleton should be at the head of the poll, whom they would desert, Cator or his brother?*" to this question no answer was made; upon which, he said to them, "*I now see you would desert my brother and support Cator;*" hereupon Notcote came forward, and said, "*What would our enemies say of us if we should not, as he pays*
so

so much more than you?" No more was said on the subject. In the afternoon of that day, Dr. Wollaston offered to withdraw his brother, according to his first resolution, and Mr. Cator agreed to repay him what he had laid out upon his canvass: As to the 300*l.* he had not paid it into the bank.

Mr. Cornwall * in his evidence said, that he had known Mr. Cator before, and would have trusted him with any sum, but would not have given credit to the parties jointly; for which reason he desired a deposit, as he had before found difficulties in getting the money advanced; that he believed the 1700*l.* was intended for the common expences of the

* When Mr. Cornwall was called to be sworn as a witness on the part of the sitting member, he said, he was a Quaker, and *affirmed*; but being asked by the counsel for the petitioner, whether he had not lately put in an answer in the Exchequer upon *oath*, he answered in the affirmative, and said, his scruples upon this point were not so rigid as those of the generality of his sect; that if the Committee thought he ought to be sworn, he would not object to the oath; hereupon the counsel for the petitioner insisted that he ought to be sworn; the Committee seeming to be of that opinion, and he not objecting, he was then sworn.

election,

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election, jointly with the 300 l. but that it was liable to such uses as Cator might think proper, and he might have drawn for it without defraying the expences; on being asked, "*Where then was the security of the deposit?*" he said, it was so, notwithstanding, in his mind.—Being asked if he did not know before the meeting of Cator and Wollaston, that the former was to make a deposit? He said he could not recollect this with certainty; he was not sure, but believed not.—He delivered in an account current of his house with Cator for the 1700 l. of which, about 1100 l. was spent, the rest was repaid to him on a draught of the 24th of May; the disbursement of the money was under the direction of Spooner.—Mr. Cornwall said, he himself was no corporator.

All the expences were paid out of this fund.

In order to shew that the lawful expences of the election, particularly the travelling charges of the out-voters, could not require such a sum as Mr. Cator placed in Cornwall's hands, the counsel for the petitioner

tioner gave in evidence the following account of the situation of the voters for him, which had been examined with the poll and the distances proved.

List of the out-voters, for Cator, and of the distances of their residence from Ipswich.

	Miles.	Voters.
Resident at Harwich, distant	11	37
Ditto, within - -	5	8
Ditto, between - 5 and 10		13
Ditto, between - 10 and 15		12
Ditto, between - 15 and 20		12
Ditto, between - 20 and 30		10
Ditto, between - 30 and 40		5
Ditto, between - 40 and 50		4
Ditto, between - 50 and 60		1
Ditto, between - 60 and 70		
(including London and its environs)		39
Ditto, between - 70 and 80		17
		158
Voters for Cator resident at Ipswich		139
Total		297
	Upon	

Upon the charge of treating the facts proved, were as follow *.

On the five days preceding the day of election, Mr. Cator had invited some of his friends in the corporation to dine with him at the Inn in which he lodged; the number never exceeded ten, and was sometimes less; among them on some days were the two bailiffs, town-clerk, and some of the portmen: sometimes he had friends of the party who had no votes, as Cornwall and Wollaston. The bill for these dinners was less than 22 l.

At the same house a number, short of thirty, of voters from London, were entertained for two days, including the day of election; and on the election day, a great number of the town voters; they had no liquor at Cator's expence before friday evening; and the landlord was ordered by Cator to give no liquor to the voters before the election; he had no orders for the entertainment on the day of election, but

* The teste of the writ of election was, on Friday the 26th of March; the election was proclaimed in Ipswich, on Tuesday the 30th following.

after

after the election Cator paid his whole bill, which amounted to 91 l. including the sum above-mentioned for his own dinners.

One inn-keeper had a bill of 28 l. paid at the bankers *, for entertaining some out-voters on the evening before the election and on the election day, with victuals and drink ; he had no orders for this, except as to one particular voter, whom Spooner directed him to provide for two days before ; but after the election, the banker's clerk ordered his bill to be made out in Cator's name and brought to the bank.

Another inn-keeper was directed by Spooner, to entertain such voters as came to his house from London, of whom, seven or eight came on the friday ; he entertained them, and fifteen or twenty more freemen of the town, that evening ; and on the election day, during the poll and after, fifty or sixty of the town besides, and twelve or fourteen more out voters added to the rest, with such victuals and drink as they chose to call for ; among them were several persons who had no votes ; his bill amounted to 59 l.

* Alexander, Cornwall, and Spooner.

which

which he carried to Cator, who paid it by draught on the bankers.

A publican at Harwich, had entertained a few freemen, resident there, on friday evening and saturday morning, without any orders; his bill amounted to 3l. 3s. which he carried to Spooner, who paid it. Cator had canvassed him at Harwich on thursday, without obtaining his promise.

About sixteen persons, chiefly voters from London, had dined at an inn in the town, on saturday before the poll closed; their bill amounted to 8l. 17s. which Cator paid in the same manner as the rest, by draught on the bankers.

Another publican had entertained about thirty Harwich voters, and a few others, on saturday and part of sunday; his bill amounted to 27l. which he carried to Spooner and was paid by a clerk of his house: he had received orders to entertain the Harwich voters from one of the corporation, a friend of Spooner's.

Another had, without any orders, entertained about twenty Harwich voters on friday night, and till sunday noon; his
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bill was 12 l. 10 s. which his guests bid him take to Spooner; he did so, and it was paid, but he expected payment from the guests, till they told him otherwise.

Another had entertained about twenty or thirty out-voters, chiefly from London, from friday evening till monday morning, by the order of a gentleman in Wollaston's interest; his bill was 33 l. which, by the desire of Cator, he carried to him, from whom, he received a draught for it on the bankers, which was paid.

Besides the above, a supper was given to about eight or nine of the London voters, at an inn in London, on wednesday evening, and a dinner at the same house, next day, to upwards of twenty voters, by the order of Dr. Wollaston's brother, who came to London in order to canvass for Wollaston and Cator; it did not appear in what manner the bill for this dinner and supper was paid (A.)

Some of the inn-keepers were freemen of Ipswich, and others not.

On friday evening, in consequence of Wollaston's declining, the two parties agreed

agreed to join in support of Middleton and Cator, and no contest was expected, till the arrival of Mr. Crickitt on that evening; many of the persons examined in the cause (who were voters) did not hear of his arrival till the next morning.

Upon the charge of corrupting the electors, the facts proved were as follow.

An extensive distribution of money was made, after the election, to many of the out-voters for loss of time, with the approbation of Mr. Cator, out of the sum in the banker's hands; thirteen voters, resident in London or its neighbourhood, who were examined before the Committee, were paid three guineas each immediately after the election; they had all their travelling expences paid besides; this sum was given without inquiry into their circumstances or the profits of their several employments, which were various; some being capable of earning five or seven shillings a day, and others two shillings; they were absent from their business, some four days, some five; to none of them was any direct expectation

given of a reward for their votes ; two or three were told, when canvassed by Cator's agent, Prigg, whom he had employed to canvass and convey voters to Ipswich, that " they should be satisfied for loss of time." Some of them had voted at former elections, and had received a similar gratuity, and said they expected it at this ; one man said to the Committee, " he could not tell what the three guineas were for, unless for his vote."—One, when canvassed by Cator's agent, bargained that his son should go and take up his freedom, and was afterwards paid five guineas by the same person, for himself and his son, though his son did not vote.

The greater number of these thirteen did not promise their votes to Cator before they went to Ipswich, though they travelled there at his expence.—They voted for Middleton and Cator.

Five voters, resident at Harwich, likewise gave their evidence to the Committee: These men, in the same circumstances as the others from London, had in the same manner received a guinea and a half a piece ;

piece; and it appeared that the same sum was given to most of the Harwich voters. Harwich is eleven miles distant from Ipswich, and the passage by water (their usual way of going thither) costs six-pence: They were absent on saturday and sunday. To all these Cator was a stranger at the time of the election, and some of them came to Ipswich intending to vote for Wollaston.

It was admitted by the counsel on both sides, that Middleton and Cator had no joint expences in the election.—And it was either proved or admitted, that all the London voters generally received three guineas apiece after the election, out of the money deposited.

Upon the charge against Spooner, these facts appeared in evidence.

That he had a very extensive influence in Ipswich, that he canvassed the town for Wollaston and Cator, and afterwards for Cator singly;—wrote letters soliciting votes for him, and in particular to Prigg before-mentioned, in London, to canvass for him and Wollaston, whose bills of expences he

paid, and to whom he gave or sent money to pay some of the London voters the three guineas; he likewise told Prigg that he had given one Burney one hundred and fifty guineas for paying expences *.—In Cator's presence, he sent an agent to London in order to accompany the freemen to Ipswich, and afterwards paid him for his trouble.—He gave orders at two inns for entertaining some of the London voters, and afterwards paid the bills.—He paid some of the Harwich voters a guinea and a half for

* In the course of Prigg's examination before the Committee, he was asked, through what channel he received the money he disbursed on the election account? he said, Spooner bid him apply to Burney for it, and was going to relate what Burney said to him on that subject, when Cator's counsel objected to the admissibility of the evidence of what Burney (a third person) *said*, as far as it might affect Cator; on the other side it was said, that Spooner having been proved an agent, and he referring Prigg to Burney, thereby made Burney an agent in respect of this reference, whatever the subject of it might be, and his conduct therein became a fit subject of evidence against Cator, by whom he was thus indirectly employed, through the medium of Spooner: the counsel for the sitting member not insisting in their objection, the question, "What did Burney say to you?" was allowed by the Committee to be put to the witness.

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loss of time; in Cator's presence, he told one who had voted, that he should have three guineas when he came to London, and paid several bills of the election expences.

Being examined himself, he said he had done every thing in the election which one friend does for another; had voted for Cator, and, as his banker, paid his draughts for the expences.

The following evidence was given of one particular charge of bribery by Spooner.

One Reynolds, who had voted in the election in 1780, for Staunton and Wollaston, had been employed at the same time in some election business for that party, upon whom he now had a demand of 4l. 16s. for expences then incurred and not paid. He met Spooner at Ipswich at this last election, and asked him, Why this demand had not been paid according to his (Spooner's) promise? Spooner told him "it should be settled; that Wollaston had declined, and Cator was in his interest:" whereupon he went to the poll and voted for Cator and Middleton. Rey-

nolds said in his evidence, he should not have voted for the yellows, if he had not been made easy on this demand. This man went to Ipswich on the part of Middleton, and was paid three guineas by his agent after the election.

Upon these facts the counsel for the petitioner argued, That the election of Mr. Cator had been obtained by corrupt influence, and must be declared void ; they said,

By the common law of Parliament, independently of the Statutes concerning bribery, no man can sit in the House of Commons who has obtained his election by the influence of money, operating generally upon the collective body, or upon any individual among them ; the evidence shews, that the sitting member did procure himself to be elected by such pecuniary influence, operating in different ways.

First, By a deposit of 1700*l.* at the desire of the leading part of the corporation, he acquired a support from them, which, it was declared by one of them, he would not have had without it; and was by them

them preferred to Wollaston, upon whose interest he at first stood jointly with him.

Secondly, By giving meat and drink to the electors, contrary to the treating act (A).

Thirdly, Under colour of payment for *loss of time*, he gave, besides all expences, uniform sums of money to the London and Harwich voters, without inquiry into their circumstances; which uniformity alone excludes the idea of compensation.

Fourthly, The deposit of so large a sum for the purposes of the election, under all the circumstances, is sufficient evidence of a criminal intention in the candidate, and renders him responsible for the abuses of its application.

The facts shew a formed design to obtain a seat in Parliament for Cator, at the expence of Wollaston's. He was invited before the portmen had seen Dr. Wollaston : If the design of the party had been to carry two members, why should Dr. Wollaston be desired to withdraw his brother ? If only one, their connection with Wollaston pointed him out as that one ; Middleton

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consented to let that party carry one, and in fact they did not attempt to carry two: But they durst not at first prefer Cator to him, and therefore they join them together, in order to fix Cator in the interest, and to prevent opposition from that quarter; when this is done, they shake off Wollaston, whose declaration with respect to expences suited not their purpose.

It is not possible to call this a free election, in which the governing part of a corporation become the agents of a candidate, in consequence of his depositing money by their advice; and resembles the well-known case of Long in Queen Elizabeth's time *, who gave money to the mayor of Westbury, in order to be returned to Parliament. The agreement in writing does not explain the original transaction; *that* was between Cator and the corporation; but none of these latter were parties to the agreement between Cator and Wollaston; nor was Cornwall, who had proposed the deposit, a party to the engagement to return part of it; it was merely a private contract for the security of Dr. Wollaston.

* 2 Doug. Elect. 401.

The operation of this deposit (which was no secret) took place visibly, for the Harwich voters resolved to leave Wollaston; this Dr. Wollaston found * on the thursday; for this, in the case of a total stranger, as Cator was, no other cause can be assigned, than the expectations which the money had raised; the story must necessarily have soon found its way through the country at the time of a general election; and the town-clerk's answer to Dr. Wollaston's question, shews what effect it had upon the corporation; it was declared as plainly as the subject admitted of being expressed.

After this, it is hardly possible to doubt that Mr. Cator owed the support of the corporation, in preference to Wollaston, to the influence of the deposit, whatever the purposes might be for which it was said to be intended; when the above answer was given, it was acquiesced in by all the leading men of the corporation, for such the persons present are allowed to be, and Spooner † himself had more influence

* This was part of Dr. Wollaston's evidence.

† One of the witnesses gave this account of him.
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than any man in Ipswich; Dr. Wollaston was so sensible of it, that he thereupon determined to withdraw his brother; Ca-
tor immediately took advantage of it, by bargaining with him for his brother's resignation, and paid his expences.

If therefore the case went no farther, and the money had not been misapplied as it has been, yet the support of the candidate being purchased by the deposit, the Committee must avoid the election; such a decision must necessarily follow upon the principles of the common law of Parliament, independently of the statutes of bribery.

The fundamental maxim of representation is, that elections must be freely made*: every act therefore by which by this freedom is interrupted is highly criminal. It has been declared in a judgment of the Court of King's Bench, that the practising of corrupt influence in elections, was al-

* I presume this alludes to the statute 3 Edw. I. ch. v. "Et pur ceo que elections doivent estre franchises, le Roi defende sur sa greve forfaiture que nul haut homme, n'autre, pur poiar des armes, ne per menaces ne disturbe de fair franche election."

ways an offence by the law of the land * ; and there are cases in the Journals, long before the time of the Treating Act, in which the House of Commons has enforced this principle, by avoiding the elections so obtained (B) : The statute is in this respect only declaratory ; it defines more exactly the crime upon which its penalties are inflicted, regulates and directs the evidence of guilt, and ascertains the punishment : But as far as any act was an offence against the freedom of elections before the statute, just so did it remain after it passed. In the same manner the subsequent statute, 2 Geo. II. ch. xxiv. superadds additional penalties against individuals.

But when the above conduct of Mr. Cator is considered upon the footing of the statute 7 & 8 William III. it appears to fall directly within its provisions ; it is forbidden, “ either directly or indirectly, to make any present, gift, or reward, or promise of either, for the use or benefit, or advantage of any individual, or of any place,

* In the cases of Pitt, and Mead, in 3 Burr. 1338.

in order to be elected (A.)” Mr. Cator’s deposit was a direct benefit, proceeding from him to the persons concerned, for the purpose of being elected; and what is still more, was by them avowed to be so.

The distribution of the two sums of three guineas, and a guinea and a half, to the London and Harwich voters, out of a fund which they might, or rather, must have known to be brought to Ipswich for the election,—and to persons most of whom had received a similar payment at former elections, and expected the same favour now, is a decisive proof of the intention with which the sum was deposited, and of the effect which the knowledge of it was expected to have: Such a scheme of corruption, if uncensured, would be as pernicious as those which disgraced the names of Shaftesbury or Hindon, at the same time that it has the advantages of regularity and security; Cornwall, who had experience in elections at Ipswich, could not have estimated the costs at so much without reckoning these gratuities in the account, (of which, the list given in evidence

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is a proof,) and his calculation was acquiesced in by Cator; the 2000*l.* must necessarily be for some unlawful expences, because no security could be wanted for the lawful ones; they are recoverable by law. If every one of the out-voters had travelled to Ipswich alone, and in the most expensive manner, the expence could not have amounted to half the sum which he required; thirty-seven of these (the Harwich voters) might be carried there and back again for a shilling each, and most of them actually took this conveyance; none travelled more than eighty miles, and only fifty-seven a greater distance than fifty miles.

It is said, that when the bill, which passed the House of Commons in the last Parliament, for preventing bribery at elections under colour of such payments, came into the House of Lords, it was opposed very strenuously by a great Law Lord in that assembly *, who declared, that the law, as it stood, wanted no such new prohibition; that all such methods of evasion were illegal and corrupt; and, as to the

* Earl Mansfield.

alleged.

alleged difficulty of conviction, his lordship added, " Whenever you find me the facts, I'll find the law for them (C)."

In short, the deposit, as it has been applied, must be considered as a general direction to the candidate's friends to use it according to their discretions; his subsequent approbation of their abuse of it, makes him a party to those abuses. It is plain, that the name of *compensation for loss of time*, now given to these gratuities, is colourable only; in every case it far exceeded any such real compensation, and in none was it given upon an estimate or inquiry; the loss of time to the Harwich voters, was but one day at the utmost.

It signifies little, that there is no *direct* evidence of general expectations being given of a future gratuity, because hints of this sort may be, and generally are given with secrecy and perfect security, and many of the voters declared they did expect it; one of the men employed to canvass did actually promise a gratuity to a few, whom he canvassed; here then is reasonable ground to believe, that they had some foundation

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for their hopes. It cannot be expected that such clear and full evidence can be produced in cases of this criminal nature, as in cases of civil contracts; in them, there is no occasion for any concealment, and all the circumstances are easily discovered; but it is not so, where it is so much the interest of the parties concerned to transact their affairs in secret.

Besides, the tendency of the present inquiry before the Committee is not like that in an information or indictment for bribery, or an action for penalties, in which the rules of penal law require more strictness of proof; the present object is only the validity of the seat acquired by Mr. Cator. It is a rule of evidence, that the acts of an agent shall affect his principal even criminally; i. e. they raise a violent presumption against him, and if it is not rebutted by contrary evidence, it ought justly to be conclusive*; he may
have

* Such, for instance, is the case of a bookseller's servant selling a book, for which, the master may be indicted for publishing a libel, if the book should happen

have the benefit of the agent's evidence to explain his acts; But in this case Mr. Cator does not call any of those whom he employed in the election.

If more evidence should be required by the Committee than has been produced, all the laws for the purity of elections will be rendered useless, because, in such case, corrupt plans of election may be securely carried on, if the authors will but guard them with a little outward covering, or semblance of propriety*.

With respect to the treating, it was notoriously carried on in the borough of Ipswich; there was in London likewise a treating, directly contrary to the act of Parliament. This is endeavoured to be justified in two ways, First, As not being by the orders of Mr. Cator; and Secondly, As not being done *in order to gain the election*, because, when it happened there

to have a libellous tendency; the sale by the servant is *evidence* of the master's assent, and becomes conclusive if not contradicted. See Almon's case, 5 Burr. 2688.

* I remember to have heard a learned Judge tell a jury, that "they ought not to expect evidence of the light of truth in deeds of darkness."

was no danger apprehended from a contest. But orders for treating the London voters were given by Mr. Cator's agent, and he paid the bills of all the inns where meat and drink had been given, without objecting to any article in them; they were besides paid out of the fund intended expressly for *the purposes of the election*; this ratification of the acts of the publicans, connected with the orders that were actually given, is evidence of an antecedent authority to them; in the instance proved of his forbiddance of liquor before the election, the bill for expences contrary to this order was paid by him without objection or question. The difficulty of obtaining more complete proof in such cases, suggested to the House the terms of the standing order of 21st October, 1678*, "by himself, or by any other in his behalf, or at his charge, &c." (D) which in 7 & 8 W. III. ch. 4. s. 1. are thus altered to be more comprehensive, "by himself, or themselves, or by any other ways or means on his or their behalf, or at his or their charge, be-

* 9 Journ. 517. and 2 Dong. Elect. 404.

fore his or their election—give, present, or allow, &c." The case is therefore brought within the words of the statute, if the Committee shall think this done *in order to be elected*; to prove which, it seems unnecessary to urge any other fact, than that the bills were paid out of the money declared by Mr. Cator to be for the election; the statute does not suppose a contest to be necessary, in order to render its provisions effectual; but there was in fact a contest expected throughout, for on the Friday on which Wollaston declined, another third person, the petitioner, declared himself a candidate: Again, the Harwich voters came to Ipswich without having promised Cator their votes. These men* were provided for by the order of a friend of Spooner's, and treated according to their own desires, immediately upon their arrival; this charge Cator also paid: In the same manner the greater part of the London voters were treated with a supper and dinner in London, and sent down to Ipswich without having promised their votes, were well fed on the road, and

* See p. 33.

entertained there : There is a difference between this sort of entertainment, and that which is given to one whose vote is already promised.

As to the conduct of Mr. Spooner the returning officer, it is a proper case for the censure of the Committee ; he appeared foremost in a bargain for that place, in respect of which he ought, as a minister of the law, to have been impartial and indifferent ; instead of which, he not only became the agent of one of the parties, but in that character did all in his power to render the provisions of the law ineffectual.

The counsel for Mr. Cator argued as follows :

The rule of evidence laid down to guide this inquiry by the counsel on the other side, cannot be admitted, because it would be overturning the law whereby the same proof is required of charges of this nature, as of any other ; the petitioner has the same means of obtaining it, and the Committee has the same power to compel it, as in other courts of justice ; the charge

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against the sitting member is criminal in a high degree, and if established, draws upon him a severe punishment, by exclusion from his seat in Parliament. It is therefore but justice to require the same legal certainty in the evidence, as is necessary in other criminal prosecutions.

With respect to the bribery of the corporation, occasioned by the deposit, the agreement shews its object to have been fair and honourable, unaccompanied with any of that secrecy with which guilt is usually attended; the whole sum is to be accounted for to both parties, and a return made; and in fact, that account has been produced to the Committee, by which the amount of the sum spent, and of that returned to Mr. Cator, is made known: And Dr. Wollaston (to whom nothing wrong is imputed, and who was as much concerned in the scheme as Mr. Cator) intended it for the common and necessary expences of the election; this is not illegal, and to impute any other motive to this fact, is to conclude from other grounds than the evidence in the cause:

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The outvoters are necessary to the support of that interest on which Mr. Cator stood, and the expences of bringing them to Ipswich, heavy ; Cornwall's experience made him require a sufficient sum, but the size of it affords no cause of suspicion, because he was accountable for its application : What had the corporation or its members to do with this ? Cornwall himself is not one of them, and the transaction passed between the two candidates and their banker, without any reference to the corporation. Mr. Cator had no desire to make a secret of it ; Dr. Wollaston had, and it is easy to discover his reason for it ; he must have been displeased to have it known, that his brother's share was so inferior to the other's, he declared it was not from a belief of any thing wrong in the affair ; but it has been inferred, that it was intended on Cator's part to make it known ; an inference not warranted by any evidence, and inconsistent with the other imputation by which guilt has been inferred from the intended secrecy.

It has been argued, that though Dr. Wollaston's conduct was upright, yet Cator and his friends had different views, as if they meant to betray him; but they could have no motive for this, they were supposed to be the prevailing party, and derived no support from him, but on the contrary, he from them; they might have proposed Cator's name to the blues, instead of Wollaston's, without any difficulty; besides, if they had had any design to betray Wollaston, they would not have admitted him into their schemes. The words of the town-clerk, on which so much stress has been laid, have no corrupt intention; they allude merely to their own notions of party honour; they meant to avoid the reproach which the blues would have cast upon them, if they should have deserted him by whose means the party was enabled to maintain itself.

As to the treating, the defence rests on two points:

First, It was not the act of Mr. Cator.

Secondly, It is not within the provisions of the statute.

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The only order that can be traced to the candidate is, that for the entertainment of the voters from London; this was not proved to be more than the necessary accommodation of travellers, which is not within the meaning of the law, at least it has often appeared in evidence before other Committees, and has never been censured; the small amount of the bills likewise confirms this: In the only instance in which Mr. Cator was informed of any treating, he directly forbade it; this single fact of innocence is enough to overthrow the whole presumption of guilt.

But secondly, Supposing Mr. Cator answerable for the treating, it is not contrary to the statute, the spirit and object of which are to prevent that distribution of money or entertainment by which the election may be influenced; the supper and dinner in London were not of this sort, they were not meetings for entertainment, but to transact the election business among the friends of the candidates, who were almost equal in number to the voters present; there was no public invitation, the
persons

persons canvassed had not promised their votes, and wanted to know the characters and circumstances of the candidates ; these meetings were to give them an opportunity of seeing the friends of the candidates, and of making their inquiries ; at Ipswich no treating took place till the friday ; (for the private dinners which Mr. Cator gave to his particular friends in the town cannot fall within that description, the company chiefly consisting of those who invited him to Ipswich) on that friday Wollaston declined, and it appears that the voters themselves did not expect a contest ; the state of the poll, in which are only seven names for the petitioner, shews, that corruption was useless ; the treating on the election day was chiefly after the poll (D). It is not argued that there must be a contest, in order to give effect to the statute, but the want of it may be urged to encounter the presumption by which the counsel on the other side would make Mr. Cator *criminal* by treating ; it shews that he could have no motive for it, and as it was done without his orders, it would be unjust,

just, either to infer guilt from the fact, or to impute that guilt to him: In order to do so, the Committee must fall into the absurdity of supposing that the candidate, at a time in which he thought himself secure, did nevertheless risk that security, in a further attempt to gain what he was already sure of obtaining, and thus lose the end by the means.

Before the Committee can convict the sitting member of bribery, by the money given subsequent to the election, they must be convinced, that the voters were taught to expect it, and that Mr. Cator was privy to the expectation; the true question here is, Was this lure in any manner thrown out as an inducement to vote? only one instance appears (and that by the evidence of a disappointed meddler in the election) in which any promise was made; Prigg said, he did promise two or three a gratuity; but he had no authority for it, being expressly employed *to canvass* only; in this act he exceeded his power, and his principal cannot therefore be answerable for it.

Bribery

Bribery is the corrupting a man to give or withhold his vote, it must precede the act done; nothing subsequent to the vote can effect it; this was admitted by the counsel on both sides in the case of Sudbury*; although two or three of the voters did expect money, and one acknowledged that he received it for his vote, this only shews the guilt of their own minds, not of Mr. Cator; for want of such connection between the subsequent act and something prior, the whole evidence respecting the London and Harwich voters ought not to have been received, and the Committee should now consider it as a blank in their minutes. The number to whom the money was given will not vary the case in the least, for a multitude of acts, in themselves innocent, can never be construed into guilt: Therefore, unless each of these payments is sufficient to fix bribery upon Mr. Cator, all together cannot; even if the giving of these sums were connected with any previous promise, it would still

* 2 Doug. Elect. 137,

be a question for the Committee, whether it was given as a compensation for loss of time, or as a bribe; for in some instances it appeared to be very little more than an adequate satisfaction for the voter's loss, and it cannot be expected that a Committee should employ their time upon an inquiry into the value of a carpenter's or shoe-maker's labour.

The proof offered of an attempt to bribe on the part of Spooner, amounts to no more than a promise to pay a just debt, without any reference to his vote; this requires no justification.

The evidence against Mr. Spooner shews no more than the legal support which one friend may give to another; although he happens to have been returning officer, he did not *in that character* discover the least partiality or abuse of his office; he is described as a man of weight in the corporation, and it would be strange to deny a man the privilege of giving a personal support to his friend, on account
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of his accidental possession of an office with which it has not interfered.

On the whole, if the Committee will consider the particular periods of the several acts charged to be criminal, and the situations of all the parties concerned, their motives and tendencies, and compare together the whole state of the evidence, simply and legally, without the aid of conjectures, they will find it impossible to say, that Mr. Cator has obtained his seat by a breach of the law.

The Committee deliberated on the remaining part of the day on which the counsel finished, and on the whole of the next; on the following day (June 18th) after some time spent in deliberation, they determined,

That neither the sitting member nor the petitioner, was duly elected, and that the last election was void as to Mr. Cator (E), which resolutions the chairman reported to the House on the same day*.

* Votes, June 18th, p. 247.

N O T E S

ON THE CASE OF

I P S W I C H.

PAGE 34, and 46. (A.) It may be useful in this place to transcribe the stat. 7 & 8 W. 3. ch. 4. called the Treating Act: The title of it is, "For preventing charge and expence in elections."

Sect. 1. "Whereas grievous complaints are made and manifestly appear to be true in the kingdom, of undue elections of members to Parliament, by excessive and exorbitant expences contrary to the laws, and in violation of the freedom due to the election of representatives for the Commons of England in Parliament, to the great scandal of the kingdom, dishonourable, and, may be, destructive to the constitution of Parliament: Wherefore for remedy therein, and that all elections of members to Parliament may be hereafter freely and indifferently made without charge or expence, Be it enacted and declared by, &c. That no person or persons hereafter to be elected to serve in Parliament for any county, city, town, borough, port, or place, within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, after the *teste* of the writ of summons to Parliament, or after the *teste* or issuing out or ordering of the writ or writs of election upon the calling or summoning of any Parliament

liament hereafter, or after any such place becomes vacant hereafter, in the time of this present or of any other Parliament, shall, or do hereafter, by himself or themselves, or by any other ways or means on his or their behalf, or at his or their charge, before his or their election to serve in Parliament for any county, city, town, borough, port, or place, within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, directly or indirectly give, present, or allow, to any person or persons having voice or vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall at any time hereafter make any promise, agreement, obligation, or engagement to give, or allow, any money, meat, drink, provision, present, reward, or entertainment to or for any such person or persons in particular, or to any such county, city, town, borough, port, or place in general, or to or for the use, advantage, benefit, employment, profit, or preferment of any such person or persons, place or places, in order to be elected, or for being elected to serve in Parliament for such county, city, town, borough, port, or place.

Sect. 2. That every person and persons so giving, presenting or allowing, making, promising or engaging, doing, acting or proceeding, shall be, and are hereby declared and enacted, disabled and incapacitated, upon such election, to serve in Parliament, for such county, city, town, borough, port or place; and that such person or persons shall be deemed and taken, and are hereby declared and enacted to be deemed and taken, no members in Parliament, and shall not act, sit, or have any vote or place in Parliament, but shall be, and are hereby declared and enacted to be, to all intents, constructions

structions and purposes, as if they had been never returned or elected members for the Parliament."

P. 45. (B.) I do not remember that the following cases were mentioned in this argument: In the case of Bewdley, 10 March, 1676, (which was about three weeks before the passing of that resolution on which the Treating Act was afterwards founded) the Committee reported, "that the chief matter on which they grounded their opinion was, the bribery of the sitting member to procure the voices of the electors; on which they had resolved, that he was not duly elected, and that the petitioner was," with which resolutions the House agreed. 9 Journ. 397.

The following cases happened after the above-mentioned resolution, (See it, 9 Journ. 411. and 2 Doug. elect. 404.) and before the Treating Act. In the case of Stockbridge, 15 Nov. 1689, the petitioner complained of bribery on the part of the sitting member, who retorted the same charge upon the petitioner, and the House declared the election void for the bribery, 10 Journ. 276, 286, 287.

In the case of Mitchell, 12 Nov. 1690, the same thing happened; as the report is short, I have transcribed it, because it states the evidence on which the resolutions of the House were founded.

" The numbers on the poll were thus,

For Mr. Rowe - 31

For Mr. Courtney (petitioner) 20

But it was testified by Peter Stapley, that as to seven that polled for Mr. Rowe, they were not housekeepers; one of which only was justified by Mr. Rowe.

It was further testified, That this election was managed by one John Atwell, on the part of Mr. Rowe,

F

who

who had offered six pounds apiece to those that would vote for Mr. Rowe.

Thomas Riccard testified, That he was present the evening after the election, when his father and eleven others, that voted for Mr. Rowe, received five pounds apiece, i. e. 3l. 18s. 6d. in silver, and a guinea, which was said to be for their wives.

John Soper said he had 3l. 18s. 6d. and a guinea for his wife; and saw Richard Eustace's wife, and Roger Nancaroe's daughter receive the like; and that this money was paid the morrow after the election.

John Atwell being examined said, What money he paid was for meat, and drink, and tobacco, and many he had paid said, they were not yet satisfied; and that he promised no money before the election."

Hereupon the Committee resolved,

First, That Anthony Rowe, Esq; and his agents were guilty of bribery, in his endeavouring to be elected, &c.

Secondly, That he was not duly elected.

Thirdly, That the petitioner was duly elected; with all which the House agreed. 10 Journ. 469, 470.

In the case of Wotton-Basset, 22 Dec. 1690, the chairman reported, That it had been suggested that the petitioner had obtained votes by bribery, whereupon the Committee had directed the counsel on both sides, "to apply themselves to the matter of bribery first;" and in conclusion, the petitioner was declared not duly elected, upon that charge, and his agent was ordered into custody for distributing bribes to the electors. 10 Journ. 522. In the cases of Chippenham and Aylesbury, in 1691. 10 Journ. 638, and 644. bribery was likewise the subject of the petitions.

In the case of Stockbridge, 20 Dec. 1693, the House declared the election "corrupt and void," and ordered a bill to be brought in for disfranchising the borough for the bribery practised at that election, 11 Journ. 36, 37.

Perhaps it has not escaped the reader's observation, that the case of Bewdley is much more apposite to the argument to which this note refers, than the others; because the latter came within the penalty of the resolution, by which bribery was declared to be a cause of incapacitation; whereas the former was determined upon the general law of Parliament, without the aid of any express resolution.

P. 48. (C.) The principal object of the bill brought in by Lord Mahon at the latter end of the last Parliament, was, to prevent bribery at elections committed by paying electors for loss of time and travelling expences: The first section inflicted a penalty of 500*l.* for giving any reward or entertainment to an elector, "on account of such person's having voted at such election, or, for or on account of, or, under pretence or colour of, any loss of time, or any expence or expences incurred by such person on account of such election, or in or by his travelling to or from the place of election or of polling."—By the second section, the Committee of election was directed to declare a candidate found guilty of so doing, incapable to serve for *that Parliament*. The bill had several other clauses, and met with great opposition, and some amendment, in its passage through the House of Commons. When it came into the House of Lords, Lord Mansfield opposed it strenuously, and after examining its principle and tendency through all its parts, declared, "*That the framers of*

the bill must have been ignorant of the law as it now stands, or they never could have thought of such a bill:—That the crime of bribery was already clearly and sufficiently ascertained by the law; for which reason, every bill prescribing new modes of prevention, tended rather to weaken and contract the law, than to enforce and enlarge it:—That the palliatives of the bill by which it endeavoured to allow of satisfaction for real expences, were liable to great fraud and abuse, because men's employments were so various, that an hour might be more valuable to one man than whole days to another, which rendered the difficulty of settling such accounts insurmountable:—That the laws in being were fully adequate to the punishment of all colourable and evasive means of corruption, under pretence of paying electors for loss of time:—That he had heard that a Committee of the House of Commons had allowed a conduct of this sort to pass uncensured†, but that if any such determination had been made, it was clearly illegal.”—The Lords hereupon rejected the bill; the manner of doing it was by a motion for its being printed, which was understood to be an extinguishment, because the Parliament was expected to be prorogued for dissolution the next day (March 24).*

* The bill in its amended state contained a clause for this purpose; its supporters in the House of Commons explained it to be an allowance of such payments, provided they did not come to the voter's hands; thus, a candidate (it was said) might pay a coachman for conveying his friends to the election, but not the voters themselves for coach-hire.

† This was supposed to allude to the case of Worcester in 1775.

P. 51. (D.) The treating act has a more comprehensive expression, than the standing order of 21 Oct. 1678 *, on which it was founded ; the words of that resolution are, " if any person shall by himself, or by any other on his behalf, or at his charge at any time *before the day of his election*, give any person or persons having vote in any such election, any meat or drink exceeding in the true value of 10l. in the whole—— or *shall before such election be made* and declared, make any other present, gift, or reward, &c." the statute defines the time generally "*before his election*," and classes in one sentence both the entertainment and the other presents, prohibiting both equally within the same period.

But the greatest difference between the resolution and the statute, consists in the evidence required of the facts ; the former declares the facts alone *duly proved* to be bribery, and criminal ; but the latter infers the guilt from the object and intention ; the several acts must be done *in order to be elected*, before the penalty attaches, according to the words of the first section of the statute.

P. 62. (E.) In consequence of these resolutions, the House ordered a new writ : Mr. Cator did not stand a candidate at the ensuing election : I have reason to think that his declining it was owing to an opinion, that he had been indirectly disqualified by the foregoing resolutions of the Committee. I do not know any decision in the Journals upon which such opinion is founded, but those who support it argue, that when the subject matter of a petition against a sitting member is bribery,

* 9 Journ. 517.

and his election is afterwards declared void upon that petition, it must necessarily follow, that he is thereby found guilty of the charges alledged against him, i. e. of bribery, and therefore becomes liable to the incapacity inflicted by the statute; that this consequence is analogous to the case of a judgment at law for the plaintiff, which following upon the declaration, necessarily convicts the defendant of the charges therein contained. But it should be considered, that the determination of a Committee is not connected with the petition in the same manner as a judgment at law is with the declaration; because, in the case supposed, by a judgment the declaration is expressly referred to, and the defendant is found guilty "in manner and form as the plaintiff hath alledged," whereas the decision of a Committee is separate and independent: Again, the charges of a declaration are specific and ascertained, but in a petition of election they are generally loose and complicated; besides which, the established method of decision upon it is known to be of the same sort, and it is often impossible for the parties themselves to discover with certainty the ground of the judgment from the *judgment* itself. Although a petition may alledge bribery only, specifically and distinctly, it will be still competent to the Committee to determine against the fitting member upon grounds upon which he may be supposed innocent; thus, they may think that the votes may not have been bribed with the privity of the candidate, or, that they were, for several reasons, reduced to an equality, or, that the petitioner himself may have been guilty of bribery as well as the fitting member; these, and other explanations, may be given of decisions like the present, and ought to be received in the favourable

favourable presumption of innocence, under laws which establish a maxim, that guilt is not to be presumed. The simple resolution of a void election, has no reference to the evidence in the cause, and it seems more consonant to law to presume, that those who pronounce upon the charge, would have expressed their sense of the sitting member's guilt, if they had thought so, than the contrary.

The instances are numerous in which it has been expressly declared, that parties have been guilty of bribery; from which it might well be inferred, that where such a judgment is not expressly given, the principle of it does not take place. I have found a variety of cases in the Journals, in which it was competent to the losing parties, upon second elections, to have taken this objection against the sitting members, yet they have not; the following are of this sort.—Case of Steyning, 13 Journ. 482.—Maidstone, 14 Journ. 73.—Boston, 17 Journ. 145.—Newcastle, 14 Journ. 315.—Sudbury, 14 Journ. 119.—Reading, 18 Journ. 455.—It is not very easy to discover from the Journals what may have passed upon this question, because they do not take notice of the returns of members not petitioned against; so that many members may have sat upon second elections, whose former seats were avoided upon a charge of bribery, without our being able to discover this in the Journals. The last case I have met with, in which this objection was open, is the case of Poole in 1769: Mr. Gulston petitioned against Mr. Mauger's election upon the sole ground of bribery (32 Journ. 31), the petition much resembled that in this case, no evidence of any other charge was produced, and the House declared his election void (ib. 197, 198, 199).

At the election ensuing upon the new writ, Mr. Gullion and Mr. Mauger were candidates, the latter was returned, yet the other never petitioned against this return.

I have heard that the contrary doctrine to that I am contending for, was established by the late case of Kirkudbright; but I have examined the minutes of the two Committees of 1781 and 1782, and find it is quite otherwise: In the general election, Mr. Johnstone was returned for this stewartry, and Mr. Gordon petitioned; the latter was determined by the Committee in 1781, to have had the majority of votes, but, upon the evidence of bribery brought against him by the sitting member, the Committee resolved, *That Mr. Gordon had been guilty of bribery at the last election for Kirkudbright**, and that the election was void. Upon the second election the same parties became candidates, Mr. Johnstone produced an attested copy of the above resolution against his opponent, to the electors, and informed them of his incapacity thereby; notwithstanding which, Gordon was elected and returned. Johnstone petitioned against him upon the ground of this incapacity, and upon the trial of his petition in February, 1782, the Committee for that cause avoided the election of Mr. Gordon and seated the other who had the minority of votes. See 38 Journ. 15, 245, 415, 689.

* The chairman did not report this resolution to the House. See 38 Journ. 245.

III.

T H E

C A S E

Of the BOROUGH of

M I T C H E L L,

In the County of CORNWALL.

The Committee was chosen on Tuesday, the 15th of June, and consisted of the following Members :

Sir Richard Hill, Bart. Chairman.

John Kynaston, Esq;

John Lowther, Esq;

William Drake, jun. Esq;

Sir John Woodhouse, Bart.

Richard Gamon, Esq;

Patrick Hume, Esq;

Sir Charles Kent, Bart.

Sir John Miller, Bart.

Charles Brandling, Esq;

Penn Atheton Curzon, Esq;

George Vansittart, Esq;

George Jennings, Esq;

NOMINEE,

Of Mr. Wilbraham,

George Dempster, Esq;

Of Mr. Hawkins,

Philip Rathleigh, Esq;

PETITIONERS,

Roger Wilbraham, Esq;—Christopher Hawkins, Esq;

COUNSEL,

For Mr. Wilbraham,

Mr. Morris—Mr. Batt.

For Mr. Hawkins,

Mr. Lawrence—Mr. Boscawen.

T H E
C A S E
Of the BOROUGH of
M I T C H E L L.

THE Committee met on wednesday,
June 16th ;

Mr. Wilbraham's petition set forth a charge of bribery against Mr. Hawkins, and alledged that a majority of persons legally intitled to vote had tendered their votes for the petitioner, but were rejected by the returning officer, by which means there appeared on the poll, for the petitioner twenty-one votes, and the like number for Mr. Hawkins, in consequence whereof, both were returned.

Mr. Hawkins's petition in the same manner complained of bribery on the part of Mr. Wilbraham, and asserted the majority of votes to be in his own favour; but
that

that the returning officer, by rejecting votes tendered for the petitioner, had reduced the numbers for each to the equality above-mentioned *.

In consequence of this double return, the Committee directed the following standing order of the House to be read :

“ Ordered, That in all cases on double returns, where the same shall be controverted, either at the bar of this House, or in Committees of privileges and elections, the counsel for such person who shall be first named in such double return, or whose return shall be immediately annexed to the writ or precept, shall proceed in the first place †.”

Accordingly, as Mr. Wilbraham was first named in the return his counsel opened his case first.

The last determination of the right of election was next read, and is as follows :

“ Resolved, That the right of election of members to serve in Parliament for the

* Votes, May 25, p. 16, 17.

† 21 Journ. 89, 18 March, 1727-8.

borough

borough of St. Michell, in the county of Cornwall, is in the port-reve and lords of the manor who are capable of being port-reves, and the inhabitants of the said borough paying scot and lot *." (A.)

Then the standing order of January 16th, 1735-6, was read †, for restraining the counsel from offering evidence against the right of election declared by the last resolution of the House.

There were four candidates at the last election for this borough, for whom the numbers on the poll were as follow : For

Howell 27

Wilbraham 21

Hawkins 21

Boscawen 15

Mr. Howell was allowed by each party to have been duly elected, and was so returned ; the only dispute was between the two petitioners. The port-reve, who presided as returning officer, had voted for Mr. Wilbraham, and upon finding the numbers for him and Mr. Hawkins equal,

* 13 Journ. 416, 20 March 1700.

† 22 Journ. 498. See 1 Doug. Elect. 99.

declared,

declared, that if he possessed a casting voice, he gave it for Mr. Wilbraham, but left the effect of it to future discussion : No argument was now used before the Committee to support such right in the returning officer ; it was given up by Mr. Wilbraham's counsel (B.)

No question arose in this cause on the right of election.

The counsel for Wilbraham founded his claim to the seat on two points :

First, To give him a majority on the poll, by adding to his numbers one vote, which had been rejected by the port-reve, and by striking off two from Hawkins's.

Secondly, If they should fail in the first point, to avoid the election of Mr. Hawkins, and render him incapable of the seat, by proving him guilty of bribery by himself or agent.

The voter rejected by the port-reve was William Nancarrow ; he claimed to vote as the occupier of a tenement called *Part of Swine's*, and had been rejected, because the Port-reve, upon the evidence produced to him, thought the tenement in question
was

was occupied by one Luke Henwood, and not by Nancarrow, and allowed Henwood to vote for it ; he voted for Hawkins.

This tenement is situated in that part of the borough which lies in the parish of Newlyn; the rate of this parish was in the usual form, the first column describing the subject rated, the second the occupier, the third the annual value, and the fourth the sum assessed ; thus,

		£.	s.	d.
Swine's tenement	R. Parker	1	1	7
Part of ditto	J. Parker	1	1	7
Another part of ditto		1	1	7

It was for this *other part of ditto* that Nancarrow claimed to vote : The counsel for Mr. Wilbraham contended, that the blank in the occupier's column was to be filled up with his name ; on the other side it was contended, that Henwood ought to stand there *. Witnesses were called to ascer-

* There were some other instances of blanks for the occupier's name in this rate. It was determined long ago, that payment to such a rating is sufficient to gain a settlement ; in the case of Heavytree, in Devonshire, in 1696, reported, 2 Salk. 478. the sessions had adjudged,

ascertain the point, and the principal matter in dispute seemed at last to be, whether Nancarrow had paid the rate ; for in general, in scot and lot boroughs, a man must be rated *and pay*, in order to derive the privilege of voting from his occupation. As the dispute turned on facts merely, I do no more than state it generally, according to the plan I have laid down for compiling these Reports.

The two votes objected to on Mr. Hawkins's poll were those of Luke Henwood above-mentioned, and of Joseph Hooper ; the case of the former depended on that of Nancarrow ; as to the latter, it was admitted that he was rated by name and had paid to the rate ; the objection was

judged, that a rate on the house without a rate on the person, was not sufficient to make a settlement, but the Court of King's Bench quashed the order of sessions, and this judgment has been confirmed frequently since ; particularly in a case reported, Doug. 543. of the parish of Heckmondwick, where the occupier paid to a rate under the name of a person deceased ; which case was founded upon one in Mic. 18 Geo. III. *The King and Walsall*, where the description in the rate was, " Late Lowbridge's."

that at the time of his being rated, which was at Easter, 1783, he was not the occupier of the tenement for which he was rated, and did not become so till the July following.

When the counsel for Wilbraham were going to produce evidence of this fact, the counsel for Hawkins objected,

That the Committee ought not to receive such evidence at this distance of time, because the statute 17 Geo. II. ch. 38.* f. 4. which empowers parties aggrieved by such a rate to appeal to the quarter sessions against it, confines the appeal to the *next* sessions (C). That the objection now made to Hooper ought to have been the subject of an appeal

* It is in substance as follows :

“ If any person shall be aggrieved by any rate or assessment made for relief of the poor, or shall have any material objection to any person's being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, or to any thing done by the justice or overseer, he may, giving reasonable notice to the churchwardens or overseers, appeal to the next sessions ; but if reasonable notice be not given, then the justices shall adjourn the appeal to the next quarter sessions after.”

to the sessions, which is the proper jurisdiction for determining such cases; and the parties not having taken that course, as the statute directs, must be considered to have acquiesced in the rate; That the Committee under these circumstances, would make the rate their guide, conformably to the practice of former Committees, particularly those of St. Ives *, and Peterborough †, in which this question had been very fully considered and very deliberately determined: That in those causes a distinction had been allowed between cases which concern the rating only, and those in which the parish officers are charged with criminality in making the rate; in the latter a greater latitude being permitted to the parties complaining; That if such a charge were now made, there might be reason for entering into the complaint, but that not being the case, the Committee ought rather to follow an established rule, than open their jurisdiction to all the inquiries of a court of quarter sessions.

* 2 Doug. Elect. 393, to 396.

† 3 Doug. Elect. 101, to 116.

The counsel for Mr. Wilbraham very candidly allowed the propriety of this argument; they said, That although it was impossible for him to have had the benefit of an appeal against the rate, as not being within the act, and not having at that time any connection with Mitchell; yet, as the proper remedy by appeal had been marked out by the statute, and the decisions of the St. Ives and Peterborough Committees were directly in point to this question, and had been deliberately made, they submitted to their authority and renounced the objection to Hooper's vote.

The remaining part of the case upon the charge of bribery, consisted of evidence to prove Mr. Hawkins guilty, by having endeavoured to corrupt a voter by means of one Curgenvén, said to be his agent, and also by having made the same attempt himself.

As to the first, two witnesses were called on the part of Wilbraham to prove the agency of Curgenvén; from whom, it appeared, that he canvassed the town in company with Hawkins, that he also went

about alone to ask votes for him, that he asked the vote of one of the witnesses for Mr. Hawkins in his presence and jointly with him, that Curgenven was steward to Lord Falmouth, on whose interest Mr. Hawkins stood, and that he and Curgenven resided together during the election in the house of an agent of Lord Falmouth's: After this evidence, Wilbraham's counsel called a witness in order to prove an act of bribery by Curgenven; this was objected to by the counsel on the other side, who argued,

That sufficient evidence had not been produced of the agency of Curgenven to intitle the party accusing to offer evidence of his acts so as to affect Mr. Hawkins; That they ought to shew that he was an agent for other purposes than canvassing, and had some authority for the purpose then carrying on; or at least, for the disposal of money for the expences of the election; That an agent was *one employed to act for another**, and though the modes of this employment are so various as to be almost indefinite, yet there are certain general

* See 3 Doug. Elect. 263.

principles by which judges should always be directed to their conclusions upon the subject; one of these is, that some allowance or approbation express or implied, or subsequent assent on the part of the principal to the act of the supposed agent, ought to be proved, before the guilt of that act can be imputed to the principal: That in the present instance no previous authority or subsequent assent on the part of Hawkins, had been proved as to any other acts of Curgenven than his asking votes for him; in which he had done no more than one friend may lawfully do for another, and which is often done by persons between whom and the candidate there is no privity or connection: That the consequences would be monstrous of determining that a candidate should be answerable for the conduct of those who may have accompanied him in his canvass or solicited votes for him; any man might in this manner be enabled to avoid the election of his opponent.

That it might perhaps be just to presume the principal's assent in cases where a previous foundation has been laid for it;

as, for instance, in the Shaftesbury case, where an inclination to succeed by bribery was clearly proved by the declaration of Sykes "*that he would spend his manor in order to get the borough* *;" such evidence of general conduct is tantamount to the particular proof of personal assent in the principal; that is, it raises a presumption of it so strong, that it is incumbent on the other party to clear himself: In the last case of Cricklade, in 1781, similar circumstances appeared on the part of the candidates; but as nothing of this sort has been attempted by Mr. Hawkins, and no illegal conduct has been proved against him, the Committee ought to reject the evidence offered to induce a presumption of his guilt; particularly when it is in the power of the adverse party to examine Curgenven himself as to the authority that Mr. Hawkins may have given him on this subject †.

* This expression was not cited from Mr. Douglas's report of that case.

† See 3 Doug. Elect. 267, 272, the case of an agent not allowed to be called on the part of the *sitting member*, when thus accused.

The

The counsel for Mr. Wilbraham argued, That if it were required in such cases to bring evidence of express agency for the purpose of bribery, it would be almost impossible, from the nature of things, ever to prove a candidate guilty of bribery by his agents; all discovery from that quarter would be thereby at once shut out; But the rule of evidence generally practised in Committees has been much more liberal; *reasonable evidence* of agency is all they have required in those acts by which the principal is affected. Such was the practice in the case of Ilchester *, and the last case of Cricklade, and others that might be mentioned; in the latter the circumstances of agency were not, as has been said on the other side, deduced from the general conduct of the candidates, but very similar to those of the present case: Bristow was there proved to be the agent of Lord Portchester, it was proved that Macpherson stood on Lord Portchester's interest, and

* I presume the point alluded to is that in 3 Doug. Elect. 160, 161; Mr. Morris, who in his argument referred to these cases, had been counsel in both of them.

that Bristow canvassed for him in company with Lord Portchester (who was then a commonner); under these circumstances evidence of Bristow's acts of bribery was received against Macpherfon.

It is not denied that there may be agents employed in different characters at elections, and that an agent for one business may have no connection with other schemes of the candidate; an agent may be appointed to attend the poll, to order an entertainment, &c. which employments may be distinct from each other, and this distinction is the subject of proof. But if a candidate will carry his friend along with him throughout the election, and be joined with him upon all occasions, he must answer for the consequences; common experience justifies the presumption of a close connection between them. As to the argument, that there ought to be some proof of assent or approbation on the part of the principal, the rule of evidence bears the contrary way; in such circumstances his *assent is to be presumed* to the acts of such an agent, and it is incumbent on the
candi-

candidate to prove the dissent, as he easily may, if it existed: This is conformable to the general practice of mankind, and to the acknowledged principles of the times.

But without entering so minutely into the question, it seems only necessary to say, that the objection has been taken too soon; if the evidence before given shall not be confirmed by that which is to follow, it can do no harm: Perhaps the manner in which Curgenven may appear to have acted upon this occasion, may serve to prove at the same time his agency and the bribery complete.

The Committee after having deliberated on the question came to a resolution, "That Curgenven's agency had not *yet* been proved."

The counsel seeming to have doubts as to the effect of this resolution, the chairman afterwards explained it by saying, "the Committee did not mean hereby to preclude them from going into evidence of the acts of Curgenven, or any other evidence to support their case; that they would be understood

stood only to have given an opinion on an independent fact."

The counsel for Hawkins still wished to have understood the resolution to have required further proof of Curgenven's agency, before the admission of evidence of his acts: But the Chairman said it had been sufficiently explained, and desired that the cause might proceed.

I have thought proper to omit a particular statement of the evidence of the bribery, for a reason which must have occurred frequently to those who have been used to draw conclusions of fact from the testimony of witnesses delivered *viva voce*; the great advantage which this kind of testimony has over written depositions, consists in the opportunity of observing the manner and character with which a witness speaks; from these is derived the best measure for ascertaining the credit due to him. But this advantage is often lost by committing it to writing; a written deposition may have all the circumstances of authenticity and truth, which, if delivered by the deponent before a jury, might have been

been disregarded. It seemed to me, that the Committee, in forming the opinion I am about to mention, of the facts of bribery related by the witness (for there was but one to this point) must have been led by his appearance and manner, to give little credit to his evidence: It would therefore be useless to state the particulars of it, since a written narrative of the facts might want some of those qualities which led to the decision.

The Committee, at the end of the day on which Mr. Wilbraham's counsel finished his case, after the leading counsel for Mr. Hawkins had concluded his observations upon it, Resolved,

“ That it is the opinion of the Committee, that no sufficient proof of bribery has been brought against Mr. Hawkins, and that no evidence need be called in his justification on that point.”

The chairman immediately communicated this resolution to the parties.

Mr. Hawkins's case being thus relieved from the charge of bribery, consisted of three parts; which were,

I

First,

First, To maintain an equality with his opponent upon the evidence already produced on his part.

Secondly, To strike off four of his votes upon particular objections.

Thirdly, To add one vote to his own poll whom the port-reve had rejected.

For the reason before-mentioned *, I shall give only a summary view of the several heads.

Upon the first, it was contended, that Wilbraham had not established by evidence Nancarrow's right to vote, as paying to the rate for the tenement claimed by him, and that therefore he could not be added to his poll : But supposing the court to be of opinion, that Henwood's vote could not be supported on the other side, his loss would be amply compensated, for upon the

Second head, They objected to two, W. Saundry and W. Parkes, for not being rated : These men voted for tenements in Newlyn parish, under the rate made at Easter 1783. It is usual to make the rate annually about the time of Easter, for the

* Page 80.

year preceding, and the new rate for this parish had not been made at the time of the election*: The above rate therefore describes the occupiers of the year 1782, or those at the time of the rate: In it no occupier's names are given to the tenements for which they voted, and the counsel for Hawkins said, they would prove, that neither of the two was in possession in the year 1782, nor till Christmas 1783, and consequently could have no title to vote*.

They objected to a third, H. Treweek, junior, for occasionality; that he was put into a colourable possession of the tenement for which he voted, for election purposes; and to the fourth, J. Parker, that

* The election came on April 6th, Easter-day was April 11th.

* The argument used upon the objection to Hooper's vote by the counsel for Mr. Hawkins (see p. 81.) might have been urged here in favour of Mr. Wilbraham, if the names of the voters had been inserted in the rate; but as no names are specified in the rate for the tenements of these voters, there could be no foundation for the appeal given by 17 Geo. II. ch. 38. as to the two voters.

he was not a true inhabitant of Mitchell, but of the neighbouring village of St. Austle, and that his mother in fact occupied the tenement for which he voted.

Third head, Frederick Knight had tendered his vote for Hawkins for a tenement in that part of the borough which lies in the parish of St. Enoder, and had been rejected by the port-reve upon an objection taken on the part of Wilbraham, against the rate of this parish, made on the 26th of March 1784, for occasionality : It was alledged to have been made before the usual time, for the purpose of the election, and that therefore no right to vote could be gained under it (D) : Knight's name was on this rate, but not on the former. No other objection was made to his vote, and the counsel for Mr. Hawkins undertook to prove the rate to have been duly made, and without any view to the election ; but they said, it would be an immaterial question, and the poll would not be affected by it, because, if it could be supposed that the objection should prevail before the Committee, it would give effect to
the

the rate of Easter 1783: In this rate the name of W. Henwood stands, who tendered his vote for Hawkins, and had been refused: (but his name had been struck out of the rate of this year, upon an appeal to the sessions *since* the election;) if Knight therefore should be rejected, W. Henwood must be received in his room. This man stood in the same predicament as Joseph Hooper before-mentioned (in p. 80.) and had been for that cause rejected by the Port-reve; but for the reason which determined Hooper's case, ought now to be restored to the poll, if the inquiry into Knight's case should make it necessary*.

Upon these several questions, which consisted sometimes of law mixed with fact, the Committee declared no separate opinion, but determined generally, *That Mr. Hawkins was duly returned, and duly elected*; which resolutions the chairman reported to the House June 21 †.

* Upon comparing the relative dates of Easter and the rate of St. Enoder in former years, with those of this year, the last rate appeared to be justified by precedent. See 27 Journ. 254. upon the same question in the case of Mitchell in 1755.

† Votes, p. 258.

N O T E S

ON THE CASE OF

M I T C H E L L.

PAGE 77. (A.) The right of election to Parliament in Mitchell has been various; in the first case in the Journals in which it appears to have been disputed, the successful candidates were chosen by persons called *Burghers*, (a name which I do not find existing at present in the borough) to which election it is said "the inhabitants also *condescended*;" the rejected candidates were chosen by *twenty-four*. 2 Journ 10. A. D. 1640. These *twenty-four* are explained in the next case, which was in 1660, to be "two elizors chosen by the lord of the manor, and twenty-two of the freemen chosen by the said elizors." The right of election was then disputed between them and the *commonalty at large*, and was decided to belong to the former, 8 Journ. 92. They do not appear to have claimed this right in the contest next following in the Journals, which was in 1689; the petitioner there contended for a right in "the inhabitants paying scot and lot," which appears to have been contrasted with that of *housekeepers*, without any mention on either side of *lords of the manor*; however, the House then came to a resolution, declaring the right to be "in the lords of the

the manor liable to be chosen port-reves, and in the householders not receiving alms." See 10 Journ. 272, 306, 307. This right was agreed to in the contested elections next following; but in that which gave occasion to the last determination, the petitioner asserts the right to be the same which the House resolve, though it does not appear that the sitting member relied upon any other. See 13 Journ. 335, 416. Since the year 1700, I do not find any dispute about the right of election.

The constitution of Mitchell is this: A superior or high lord, and five mesne or deputy lords who hold of him; the port-reve who presides in the borough, is one of the deputy lords annually chosen to that office at the court-leet of the high lord; the high lord has not the privilege of voting for members of Parliament. It is no corporation and never was, notwithstanding the use of the words *commonalty* and *freemen* in the first resolutions of the House of Commons. Willis, in his *Notitia Parliamentaria*, 2d vol. p. 155, says, it first sent members to Parliament in the sixth year of Edward VI. in the return of that year it is called *villa Mychel*, in others subsequent, *burgus vel villa*. Perhaps the *freemen* alluded to in the Journal are those whom Willis (p. 157.) calls *a jury of the principal inhabitants*, who, he says, choose the port-reve, and used to choose the members; in this sense the word freemen is only a translation of the *liberi homines*, or homagers, of the antient feudal court: In the same manner Willis speaks of the "*freemen* of St. Germain's," and "*burgesses* of St. Mawes," (expressions likewise found in the Journals) though these boroughs are not corporations; in Westminster also, which is no corporation, there is a court of burgesses.

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I have been led to these particular observations on the state of Mitchell, by a doubt contained in a judicious note subjoined by Mr. Douglas to the case of Poole (2 Doug. Elect. p. 298). It is there questioned, upon the authority of Lord Holt, whether *inhabitants* not incorporated, are legally capable of the right of sending members to Parliament, except by prescription; the case of Westminster there mentioned, shews the author's own opinion upon the subject. He is confirmed by many other instances; Mitchell is one, the right of representation commenced there in the same reign with that of Westminster; in Callington, Newport in Cornwall, and Minehead, none of which are corporations, the right of election is in *inhabitants*, yet their representation has also commenced within time of memory: Newport having first sent members in the reign of Edward VI. the two others in the reign of Elizabeth.

The truth is, that no system founded on maxims of modern law, can account justly for the wonderful variety that occurs in parliamentary representation. In its origin it is entirely feudal, and its modern use can only be explained by tracing the changes which feudal tenures and feudal principles have undergone.

The antient history of boroughs does not confirm the opinion above referred to, which Lord Chief Justice Holt delivered in the case of Ashby and White: For there is good reason to believe, that the elections in boroughs were in the beginning of representation popular; yet in the reign of Edward I. there were not perhaps thirty corporations in the kingdom: Who then elected the members of boroughs not incorporated? plainly, the inhabitants, or burghers (for at that time

every inhabitant of a borough was called a burges); and Hobart refers to this usage in support of his opinion in the case of Dungannon. Hob: 15. 12 Co. 121. The manner in which they exercised this right, was the same as that in which the inhabitants of a town, at this day, hold a right of common; or other such privilege, which many possess who are not incorporated *. When I speak of corporations in the foregoing passage, I use the word in that sense in which it is now understood, to mean, bodies politic having perpetual succession and possessing various independent powers which individuals cannot attain: But we must not imagine that these powers were conveyed to boroughs in the first charters which they received from their feudal sovereign, whether king or lord. It appears, from the state of the boroughs of this kingdom described in Domesday-book, all of which are quoted by Dr. Brady in his History of Burghs, that the inhabitants of them, in the period of that survey, were the vassals of the lord of the borough, (who in many was the king) or villeins appendant or in gross: They paid for their lands and dwellings different services to the lord, and generally a kind of protection money for liberty of trading, for exemption from certain burthens, and for other privileges, according to the situation and extent of the borough. As their numbers and wealth increased, they became able to buy in these rents and services, the king or lord reserving only a chief-rent in their stead, and thus they procured grants that their borough should be "*liber burgus*," and they themselves became "*liberi burgenfes*," i. e. emancipated from the rigours of the feudal subjection, in the same manner as *liberi ho-*

* See Co. Lit. 110. b.

mines were contradistinguished from bondmen. Boroughs upon the sea-coast were the first in procuring these grants, from their greater substance, and from the desire of the inhabitants to obtain the freedom of their port to themselves. Hereby the sovereign yielded up the immediate fruits of his lordship, either for a sum of money, or certain annual rent, or in order to improve his estate by the encouragement of trade.

To one who does not consider the subject in this point of view, the expression "*liber burgus*" in the first charters to boroughs, containing the first and greatest privilege in them, must appear unintelligible. But it will be found to have been the most essential part of the charter, for as their former state was a dependent vassalage of the lowest kind, they are thereby raised to a state of freedom, and their place of residence, their burgh, is made free too, and exempted from the immediate jurisdiction of the lord. This is the origin of free boroughs and free burgesses*; in the first charter to Dunwich, King John grants "*quod burgum de Dunewic sit liberum burgum nostrum*;" so to Bridgewater, "*dilecto & fideli nostro Willielmo Brierley quod brugge Walteri sit liberum burgum & quod ibi sit liberum mercatum & una feria—cum theloneo, paagio, pontagio, passagio, lestagio, stellagio, & cum omnibus aliis liberis consuetudinibus ad liberum burgum—pertinentibus. Concessimus etiam prædicto Willielmo quod prædicti burgenses sui—sint liberi burgenses, &c.*" Brady Hist. Bur. Appendix 13 & 22, the author has there printed several other charters of the same import. In the first charter to Pontefract, dated in 1194, the lord of the borough grants to his burgesses

* See Brady Hist. Bur. 100.

of Pontefract their *liberty and free burgage*, and their tofts, yielding yearly for all service, and for every whole toft 12d: For this and some other favours the burgesſes pay their lord 300 marks. The ſtate of ſervitude in which the inhabitants of towns were held under the feudal ſyſtem, prevented them from improving their ſituation to their own benefit, or to their lord's: Conſiderations of this kind may have occaſioned the firſt grants of privileges to them. But the idea of a corporation, *corpus politicum*, the *universitas* of the civilians, the *communitas* of the feudists, is ſurely of a date long ſubſequent to that of becoming *liber burgus*. Although many towns, and particularly London, are now called corporations by preſcription *, that is not ſo well warranted by the truth of hiſtory, as by the favouring principles of our law. The conqueror's charter † to London grants indeed the privileges enjoyed under his predeceſſor, but theſe ſeem to be no more than that the citizens ſhall be freemen (*lawworthy* is the term), and be capable of the right of inheriting, a ſtate manifeſtly contraſted with that of being in *dominio domini*; it is addreſſed to the biſhop and *port-reve*, but that alone does not prove it to have been a corporation, for the port-reve was an officer employed to receive the King's port duties. Robertſon, in his proofs and illuſtrations to the firſt volume of his hiſtory of Charles V. ‡ juſtly diſtinguiſhes between the inſtitution of *communities*, and theſe charters of *immunity* or franchise; according to him, charters of community, or thoſe which erected corporations, were not

* See Brady Hiſt. Bur. 162

† Brady Hiſt. Bur. 28.

‡ P. 39 & 301.

common in France till the beginning of the twelfth century: And as it is allowed by our antiquarians, that England generally followed France in her political institutions, it is not probable that charters of incorporation took place in England till after that period. The crusades had made the nations of the north and west of Europe acquainted with the advantages which the cities of Italy derived from their independence; and (as there is room for conjecture on this subject) I should imagine that those nations may have learnt the method of conveying equal powers and privileges to their own cities, by the revival of the knowledge of the civil law in the first part of the twelfth century; hence they may have taken the *jura universitatis*, which are essentially different from the *libertates burgi*; and hence perhaps began a practice which has established a maxim in the law of France, as well as in our own, that corporations can only derive their existence from the crown; to incorporate, is a royal prerogative; but it is plain from what is said above, that, to enfranchise, was the prerogative of every feudal lord. See Du Cange's Glossary on the word *Communia*: This author derives the institution of corporations in France from the design of its Kings, first practised by Lewis VII, to raise them up against the power of his barons: If it were so, it well accounts for the principle by which this right became appropriated to the sovereign.

P. 78. (B.) Glanville, in his Reports, p. 21, says, "of common right in case of equality of voices, the mayor of a town hath no casting or over-ruling voice in the affirmative to carry an election, without the help of a custom, or some other special matter, to enable him in that behalf.—But the electors ought to
continue

continue together, or meet again by adjournment, till they can agree to an election by plurality of voices." I have met with two cases in the Journals, wherein the House have, in the first instance, and without waiting for an enquiry into the merits, or for petitions from the parties, declared the election void, on account of this equality of voices; but it is not likely that these precedents will be followed now. In the case of Tiverton in 1710, there were three candidates, all of whom had an equal number of votes, for which cause the House avoided the election, and ordered a new writ, before the time for delivery of petitions had expired *. The same had been done before in the case of Gatton in 1660, where there were four candidates, for three of whom the votes were equal, and for the fourth there was a smaller number †.

P. 81. (C.) I do not know any case, in which it has been determined that by the construction of this act, the appeal must be to the sessions next after the *rate*: In the stat. 13 & 14 Charles II. ch. 12. s. 2. it is in the same manner directed, that the appeal of any person aggrieved by an order of removal, shall be to the *next* sessions: It was determined in the King's Bench, that the *next* quarter sessions alluded to by this act, to which the appeal must be brought, is the *next after the party is grieved*, 12 Mod. 336; which is not by the signing of the order by the justices, but by the removal in execution of it, 2 Stra. 831. So it might be said of an appeal against a rate, that the party is not grieved till called upon for payment; but it should be observed, that there is this difference between the two cases, that

* 16 Journ. 407.

† 8 Journ. 13.

a party cannot be presumed to have notice of an order of removal till it is executed; whereas public notice of a rate is always given in the church the next Sunday after it has been allowed, (by 17 Geo. II. c. 3. s. 1.) of which all the parish are presumed to be informed, and laches might justly be imputed to him who does not know it.

The stat. 43 Eliz. ch. 2. limits no time for an appeal authorised thereby, but directs generally, that if any person is aggrieved, the justices in their sessions shall have cognizance of the matter*; and some persons were of opinion, that an appeal against a poor-rate under that act, notwithstanding the 17 Geo. II. ch. 38. might still be preferred to any sessions, indefinitely, because the objects of the two statutes are different†: But it was determined by the court of King's Bench in last Trinity term‡, in the case of the borough of Penryn, that an appeal against a poor-rate must, by the 17 Geo. II. ch. 38. be brought to the *next* sessions, in all cases; and that this act is, as to that, a repeal, or rather limitation of 43 Eliz. ch. 2.

P. 94. (D.) By the report of the contested election for Mitchell in 1755, (27 Journ. 254, &c.) there appears to have been then a similar objection taken against the rate: There had been, previous to that election, a *monthly* rate made on the day on which the election was proclaimed; but the party taking the objection did not rely solely upon that; they went into an examination of the particular articles, in order to prove not only that the rate had been unfairly made, and occasionally, but likewise that this had been done for the

* Sect. 6.

† See 3 Burn's Just. 303, 13th edit.

‡ Trin. 24 Geo. III.

purpose of giving votes to improper persons. The single objection of occasionality, to the rate, seems not to be a sufficient cause for avoiding a right in other respects lawfully acquired under it; for if a man is justly rated, it would be hard to involve him in the fraud of those who may have abused their office in making the rate.

There is a manifest difference between this case, and that of derivative titles in corporations gained under presiding officers, illegally made; because in them the origin of the title is intrinsically illegal; whereas here it only becomes voidable by matter extrinsic, and to certain purposes only: For without question such a rate would be effectual to every purpose, but that of the election. In the case of St. Giles, Cripplegate, and St. Mary, Newington, in Viner's Abr. tit. *Settlement*, K. 9. it was determined by the court of King's Bench, that a man may gain a settlement by being rated and paying to a rate not legally made: Viner, in a marginal note to that case says, "it was held to be a contributing to the public levies of the parish, and the parish have had as much benefit of the contribution, as if it had been a good rate." In the same manner, the Committee, on the case of Milborne Port, (1 Doug. Elect. 129.) where there were two sets of persons claiming to be parish officers, determined, "That persons rateable having paid to the rate, though that rate be made by officers illegal or doubtful, have a right to vote as inhabitants paying scot and lot."

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IV.

T H E

C A S E

Of the BOROUGH of

D O W N T O N,

In the County of WILTS.

The Committee was chosen on Thursday, the 17th of June, 1784, and consisted of the following members :

John Parry, Esq; Chairman.
Francis John Browne, Esq;
George White Thomas, Esq;
John Call, Esq;
Filmer Honeywood, Esq;
Lord Apsley.
Edward Miller Munday, Esq;
Richard Slater Milnes, Esq;
Henry Addington, Esq;
Brooke Watfon, Esq;
Hon. Edward James Eliot.
Sir William Leman, Bart.

NOMINEES,

Of Shafto and Conway,
Right Hon. William Eden.
Of Bouverie and Scott,
Lord Advocate of Scotland.

PETITIONERS,

The Hon. Henry Seymour Conway, and Robert Shafto, Esq; upon one return; the Hon. Edward Bouverie, and William Scott, Esq; LL. D. upon the other. Certain Freeholders of Downton in the Interest of Shafto and Conway, and James Hill and George Quinton, Freeholders of Downton, in the same Interest, by two separate Petitions.

COUNSEL,

For Shafto and Conway,
Mr. Serjeant Adair, and Mr. Douglas.
For the Freeholders,
Mr. Piggott.
For Bouverie and Scott,
Mr. Wilson, and Hon. Mr. Erskine.

T H E

C A S E .

Of the BOROUGH of

D O W N T O N .

THE Committee met on Friday the
18th of June:

The petition of Shafto and Conway, and of the electors in their interest, alledged that Henry Harrison, Esq; was the legal returning officer of the borough, that his return was the legal one, and that the petitioners had the majority of legal votes; That John Dagge, gent. had, without any right, taken upon himself to act as returning officer, and had rejected many legal votes for the petitioners, and received many illegal ones for Bouverie and Scott, whom he had falsely returned as burgesses in prejudice of the petitioners. The petition of Hill and Quinton contained

ed the same allegations, and also a complaint that their votes had been rejected by both returning officers.

The petition of Bouverie and Scott set forth, That the legal returning officer of the borough is the bailiff, or steward, of the lord of the manor and borough of Downton or his deputy ; that at the last election, Joseph Elderton, Esq; was bailiff or steward, and appointed John Dagge, Esq; to be his deputy for the election who was the proper returning officer, and had returned the petitioners by a great majority, but that Mr. Harrison had usurped the office under a deputation from ——— Serle, Esq; and by illegally admitting and rejecting votes had procured a majority for Shafto and Conway. — That Shafto and Conway had also been guilty of corrupt practices * at the election, and that the former was disqualified * from being elected by holding a place in the customs †.

** Neither of these charges was proceeded upon in the cause.

† Votes, 25 May, p. 18. 26 May, p. 54. 27 May, p. 58. 3 June, p. 134.

This

This being the case of a double return, the standing order of 18 March, 1727-8, was referred to, which directs, " That in such cases, the party whose name stands first, or whose return is next to the writ, shall be considered as the petitioner, in the form of proceeding *."

According to this order the counsel for Shafto and Conway opened their case first, their return being immediately annexed to the writ.

There is no resolution of the House concerning the right of election in Downton, but it has been always understood to be a borough of burgage tenure, and the right of election to be in the freeholders of antient burgage tenements holden of the lord of the borough under the usual conditions ; and it was so agreed by both sides on the present occasion.

The questions agitated in this cause being very important to those who are interested in this species of property, (perhaps more so than any which have yet arisen out of the

* See the Order in p. 76.

subject,

subject) and the decisions having been distinctly and deliberately given upon each, their authority as a precedent may hereafter become valuable; for which reason, I have, in the following report treated each question separately, although in the course of proceeding and arguments of counsel during the trial, many were blended together.

The points now in dispute are totally different from those agitated in the late contests for this borough, yet it may be useful shortly to state the nature of those contests. There have been three before the House of Commons since the year 1774; the first of these being reported by Mr. Douglas, is too well known to require any particular relation: The dispute then turned upon the *splitting* and the *occasionality* of the votes, upon either or both of which points the decision may have been founded; but as it involved both, neither was ascertained; the event was unfavourable to Mr. Duncombe's interest*. A va-

* 1 Doug. Elect. 207.

cancy,

cancy, by the death of one of the members, having occasioned a new election in 1779, Mr. Duncombe was returned without opposition *: He did not live to enjoy his seat. Upon his death, a new election happened which was contested by Mr. B. Bouverie and Mr. Shafto; Mr. Bouverie was returned and Mr. Shafto petitioned against his election †; the merits of the case before the Committee which sat upon this petition, turned upon the *occasionality* of the votes for Mr. Shafto. Their determination was in favour of Mr. Shafto ‡, by which they in effect decided, *That the objection of occasionality did not attach upon votes of burgage tenure* (A). In the general election of 1780, a contest arose between other parties founded solely upon the same objection of occasionality §, which was very strenuously argued by the petitioners' counsel before the Committee, whose determination confirmed the former.

* 37 Journ. 461, 499.

† See the petition, 37 Journ. 521.

‡ 37 Journ. 608.

§ See the petition, 38 Journ. 17.

Hitherto the state of property of the contending parties in this borough had been different from that in which they stood at the last election. The late Anthony Duncombe, Lord Feversham, was proprietor of the greater part of the burgages in Downton, to some of which he was intitled under a settlement of Sir Charles Duncombe, the rest he had purchased: Upon his death in 1763, without male-issue, the settled estate descended to the late Mr. Duncombe; the remainder of his estates in Downton he by will directed to be sold for the benefit of his two daughters, giving the refusal of them to the Duncombe family in order to prevent disputes: The present Earl of Radnor married one of the daughters, Mr. Bowater the other; Mr. Duncombe left a daughter, married to Mr. Shafto, to whom he bequeathed his Downton estate. The trusts of Lord Feversham's will not having been carried into execution, the manner in which his trustees exerted the influence of his property, occasioned a new scheme of election in Downton after the dissolution of the late Par-

Parliament; for in the former elections, the opposition to Mr. Duncombe's family had not been maintained by the estate of Lord Feversham, or by any other family interest; but by the legal objections before-mentioned, rendered successful in the first instance, to the titles of the voters: But in the last election, Mr. Shafto having the strength of Mr. Duncombe's property, was opposed by that of Lord Feversham's, which his trustees employed for that purpose.

At this election, the two persons mentioned in the petition having acted as bailiffs or returning officers, and each having taken a poll, the voters for both parties tendered their votes to both of them.

The numbers on the polls, as delivered in to the Committee were,

On Harrison's poll,	
For Shafto	50
Conway	49
Bouverie	38
Scott	37
Majority for Shafto	12
Conway	11
I 2	On

On Dagge's poll.

For Bouverie	44
Scott	43
Shaffo	2
Conway	1
Majority for Bouverie	42
Scott	41

Thus it became necessary to determine, previously to the examination of the merits, by which poll the Committee were to proceed in their inquiry; or in other words, which of the two returning officers was the legal one. This question being entirely distinct from the merits of the election, the Committee, as well as the counsel, were desirous to have it separately argued and determined. It was accordingly proceeded on in the first place.

The facts out of which it arose, and which were either proved or admitted, were these.

The Bishop of Winchester is chief lord of the hundred, manor and borough of Downton; the manor and borough are

leafed

leased out for lives, and have so been from the reign of Elizabeth, in the ordinary mode of Bishop's leases; the present lessee of which is Sir Philip Hales, as trustee for the daughters of the late Lord Feversham. The words of the lease descriptive of the premises granted by the Bishop, are these following:

“ All that his lordship, manor and burgh
 “ of Downton, with Charlton Knighten-
 “ hold, in the county of Wilts, together
 “ with all and singular the rights, mem-
 “ bers and appurtenances thereof, and all
 “ the houses, lands, tenements and here-
 “ ditaments, rents, reversions, services,
 “ views of frank pledge, leets, hundreds,
 “ courts, perquisites of courts, heriots,
 “ amerciaments, waifs, estrays, goods of
 “ felons, fugitives, deodands, wards, reliefs,
 “ &c. &c. with all and singular their ap-
 “ purtenances to the said manor and burgh
 “ or either of them in any wise belonging
 “ or appertaining, or which have been de-
 “ mised or reputed, parcel, or member of
 “ the said manor and burgh.”

These terms have been uniformly inserted in all former leases, one of which, in the reign of Elizabeth, and another in the reign of Charles I. were read.

The bishop, as lord of the hundred, appoints a bailiff of the hundred, who holds a hundred court and collects the Bishop's rents; the stile of this office is, "The office of bailiff of the bailiwick of the lordship of Downton;" it is at present held by Mr. Serle, under a patent granted by the Bishop in 1772, to him and Mr. Duthy jointly, he being the survivor (B. 1.) Mr. Harrison acted as returning officer at the late election, under a deputation from Mr. Serle, (B. 2.)

The lessee of the manor and borough appoints a steward, who holds the manor and borough courts, and collects the copyhold and burgage rents; Mr. Elderton is the present steward, from whom, Mr. Dagge received a deputation at the late election *. The manor and borough are

* Mr. Elderton's appointment to the office of steward, and his deputation to Mr. Dagge were both produced in evidence. See (B. 3. and 4.)

both

both within the hundred, but are distinct both in boundary and jurisdiction; the former is all copyhold, the latter all freehold; the hundred and the bailiwick are the same, extending more than twenty miles, and comprehending several towns and royalties. No person holds a court within the manor and borough but the steward of the lessee; but in the borough of Hindon, which is likewise within this hundred, the Bishop's bailiff is the returning officer.

As far back as the records of this borough can be traced, i. e. from the year 1593, to the year 1670, the returns to Parliament were made by the Bishop's bailiff often styling himself in the return, "bailiff of the hundred," from that period to 1780, the returns were made by the steward of the borough.

The evidence produced on this point by the counsel for Shafto and Conway consisted of

The grant to Duthy and Serle, which is in the same form with the former grants of the office.

Serle's deputation to Harrison, (B 1. and 2.)

The register book of the Dean and Chapter of Winchester, in which there is an entry dated 16 January, 1593, whereby the Bishop grants "officium ballivi ballivatûs domini de Downton & omnium & singulorum maneriorum, &c." to John and William Stockman, the father and son jointly.

A return to Parliament, in 1620, by William Stockman, *ball.' bund.' de Downton*.

A return in 1623; in this the name of the person called "ball.' hund.' de Downton," is obliterated, but it is signed by William Stockman.

Three other returns by the same William Stockman, two in 1625, and one in 1640.

An entry in the same register, dated 7 Nov. 1660, of a grant of this office by the Bishop, in the same terms as the former to Joseph Stockman and William his son.

A return, dated 1 April, 1661, by Joseph Stockman, consisting of two indentures of the same day, in one of which, one member, Gilbert Rayley, Esq; is returned, another member, Walter Buckland, in the other (C).

The

The Commons Journal of 17 May, 1661*, which is as follows:

“ Serjeant Charleton reports from the said Committee, touching the double return for the borough of Downton, that Gilbert Raleigh, Esq; and Water Buckland, Esq; are returned by one indenture; and John Elliott, gentleman, and Giles Eyre, Esq; by another indenture; and the opinion of the Committee, that Mr. Raleigh and Mr. Buckland being returned by the proper officer, ought to sit until the merits of the cause, touching the said election, be determined,

Resolved, That this House agree with the said Committee, that the said Mr. Raleigh and Mr. Buckland being returned by the proper officer, ought to sit in this House, until the merits of the cause, touching the said election, be determined.”

A return, dated 15th Dec. 1670, by the same Joseph Stockman.

The above returns are all that are extant from 1593 to 1670. A return was pro-

* 8 Journ. 253.

duced of 1684, while John Snow was steward of the borough, consisting of an indenture between the sheriff and the *burgesses* only, without any mention of the returning officer; but this was considered by the counsel on both sides as an irregular return, and not mentioned in argument *. The last piece of evidence produced, was the return in 1780, by Duthy the bishop's bailiff; the circumstances of which were explained in the following manner; Mr. Poore, who was the steward of the manor and borough, died in 1780, before the election, and no successor to him being appointed when the election came on, the precept was delivered to Mr. Duthy, who executed it as returning officer: Mr. Blake, solicitor for Lord Feversham's trustees, attended at the poll, and on behalf of them and of Lady Radnor and Mrs. Bowater, protested against Duthy's officiating, who, before he proceeded to the election, declared he was ready to resign the office, if any other appeared to claim it; and asked

* The name of Snow appeared among those of the *burgesses* in this indenture.

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aloud if any other claimed to act as returning officer; upon no answer being made, he was regularly sworn and took the poll. In the course of the trial of the petition upon this election there was no mention made of the returning officer, or of the legality of the return *.

The evidence produced by the counsel for Bouverie and Scott, in support of the lessee's steward, consisted of entries in the court books of the borough, of the appointments of the steward, and of returns to parliament: Mr. Elderton the steward produced the court books. The entries of the manor and borough courts are kept in the same book, but on separate leaves, under the distinct titles of "Burgus de Downton," and "Manerium de Downton;" the first entry read was one by which John Snow, Gent. appears to have been steward in 1675, and from thence to 1699. — His appointment was produced (B. 5.) He is in these books always called *steward* (*seneschallus*) the term *bailiff* is not used. There were six returns produced be-

* See before, p. 113.

tween the years 1678 and 1697, made by John Snow; in these he calls himself *bailliff*. Snow was succeeded by Samuel Foster in 1699, and Nicholas Langley was his deputy. Three returns were produced during his stewardship in the years 1699, 1700, and 1702; two made by him, and one by his deputy—he too is called *bailliff* in the returns, but in the court books there is no appointment of a bailliff, *eo nomine*. Mawson became steward in 1706; eight returns were produced made by him and his deputy; his deputation to Leonard Fletcher was produced in evidence (B. 6.); he was succeeded by Tarrant in 1740; two returns were produced made by him as steward. Poore succeeded him in 1745, and continued steward till his death, except when he himself was one of the members, upon which occasion Eve was made steward; his appointment was produced (B. 7.): Ten returns were produced made by Poore, and two by Eve. Mr. Elderton said, there were extant more antient books than those produced, which go back to the reign of Elizabeth, but not regularly; he did not
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recollect to have seen the *name* of the steward in them.

They then read the entries of the Journal of 3 May and 9 May 1660*, to explain the entry of the Journal read on the other side.

The entry of 3 May is in p. 10. as follows;

"Mr. Turner also reports from the Committee for privileges and elections, touching the double return for the borough of Downton, in the county of Wilts, the opinion of the Committee, that Thomas Fitz James, Esq; and William Coles, Esq; are returned by the bailiff to whom the warrant was directed, and ought to sit until the merits of the cause upon the said double return be determined.

"Resolved, &c. That this House doth agree with the Committee, that the said Thomas Fitz James and William Coles, Esqrs. who are returned by the bailiff, to whom the warrant was directed, do sit in this House, until merits of the cause upon the said double return be determined."

* 8 Journ. 10, and 18.

The entry of 9 May is in p. 18. as follows :

“ He (the chairman, Mr. Turner) also reports from the said Committee, touching the double return for the borough of Downton, in the county of Wilts, that upon examination of the fact it appeared to the Committee, that Giles Eyre the younger, gentleman, and John Elliott, are duly chosen to serve in this Parliament for the said borough, and ought to sit.

“ Resolved, That this House doth agree with the Committee, that the said Mr. Eyre and Mr. Elliot are duly chosen, and ought to sit; and that the *mayor* * of Downton do amend the return †, and in-

* It was contended on one side, that the House used this word, by mistake, for that of *bailiff*. The borough of Downton is no corporation, but a *mayor* and constables are annually appointed at the court-leet of the borough; the office of mayor is only nominal.

† It was customary at that time for the House of Commons to order the returning officers to attend the House, and amend the returns; the modern practice of ordering the clerk of the crown to make the amendment, was not generally established till late in the reign of Charles II.

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fert the names of the said Giles Eyre and John Elliot, instead of Mr. Fitz James and Mr. Cole, who were returned by another Indenture."

Upon this evidence it was argued by the counsel for Shafto and Conway,

That the bailiff of the hundred is the legal returning officer of the borough. The bishop, as lord of the bailiwick, has the right of appointing the returning officers of the boroughs within it; he is proved to have exercised this right in Downton beyond time of memory. The borough being by prescription, the office must be so likewise, because it must be coeval with the first returns: There are two modes of proving such a right; either by evidence of the fact from living witnesses, for time of memory, or by the written evidence of former periods; for if a right is proved to have existed once, without contradiction, the law presumes it to have existed always: In the present instance, the office is proved to have been exercised by the bailiff of the hundred, unmolested, from 1620 to 1670, if not from 1593, of which also the evidence

dence furnishes a fair presumption ; this therefore is sufficient evidence of a prescription in his favour. Added to this, there is a judgment of the highest authority confirming it, for the Journals shew that the question has been agitated in the House of Commons, where his right has been expressly recognized, and he is called *the proper officer* ; this being a judgment of the proper jurisdiction, on the point, fourteen years before the commencement of the right contended for by the lessee of the manor and borough, ought to have the greatest respect paid to it, and is not to be affected by any subsequent practice.

As it cannot be denied that the right to appoint this officer is in the lord of the bailiwick, it must, in order to make out the lessee's claim, be shewn, that he has parted with it by leasing the manor and borough : Now, there are no words in the lease describing it ; it must therefore be by implication of law ; but how can this be, when the exercise of this office by the bailiff of the hundred happened for so long a period during the existence of a lease made in
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the same terms as the present? This shews clearly, that the grant at that time was not understood to convey this office; and if we consider that the lease of that period may have been one of the first ever granted, (for it was in the 28th year of Elizabeth, not long after the limitation upon ecclesiastical grants) this *cotemporanea expositio* will have considerable weight.

The place of returning officer of a borough is not necessary to the grant of the lordship in which the borough stands; it is in this character that he is called *bailiff of the borough*; he holds courts, summons freeholders, &c. as *steward*, not as bailiff: But it is the *bailiff* who returns to Parliament; whereas the court books alway stile the person, whose claim is now depending, *steward*. In all election rights it is particularly necessary to guard against the effect of modern usage, when it militates against the more antient, because these rights being all of great antiquity, must certainly be handed down to us more pure, according as the time of their establishment is remote.

The usurpation by the steward of the manor, and the acquiescence of the other party, are easily accounted for by looking into the history of Downton; from the time of the resolution of the House in 1661 to the year 1774, no contested election in this borough has proceeded so far as to be heard before the House; during a great part of which time most of the burgage property has been possessed by one family*, which has likewise been lessee of the lordship, so that it became less material who took the poll, and made the returns: The office then must have been burthensome and unprofitable.

At present, however, it cannot be said that the modern possession of the office by the stewards has been regular or uninterrupted, for in fact the last undisputed exercise of it was by the bishop's bailiff, who made the return in 1780, which was a contested election; he has been thus, as it were, *remitted* to his antient right, having present possession, and a prior title.

The counsel for Bouverie and Scott argued thus,

* The family of Ashe.

The

The office of bailiff, or returning officer, is in the appointment of the bishop's lessee, who is by the lease made lord of the borough; it is incident to the grant of the lordship. If this right shall be established on principles of law, it must be deemed prescriptive, and the exercise of it by others, however antient, is not sufficient to overturn it.

This claim is most consonant to reason, for he who holds the lordship, and receives the rents, is the proper person to appoint the bailiff or steward; it would be absurd in the bishop to appoint one, after the whole lordship is leased out, and one entire sum paid for it.

The instruments themselves, upon which both sides found their claims, are not alone sufficient to support them, for neither the grant of the manor, nor the bailiff's patent, does in terms convey the office in question; but the former conveys to the lessee "*all the manor and lordship, &c. with the appurtenances,*" which words comprehend every thing annexed to it by law; the latter only conveys to the patentee, in ge-

neral terms, an authority over the bailiwick; which authority must be limited by others derived from the same source with which it is inconsistent. That there is such inconsistency is evident from the facts in the cause, for the bailiff of the hundred exercises no internal jurisdiction whatsoever in the borough, not even by holding a court; his receiving the bishop's rent from the lessee is in the quality of agent, or *collector*, merely; he receives none of the lord's rents, nor does any act on the bishop's behalf within the borough; all the borough duties are performed by the steward; which affords a strong presumption, that the officiating in this single instance of the return was an encroachment upon the steward's office. The present patent gives the office in *as ample manner as Field and Frome* (two former bailiffs) *held it*: But neither of these ever exercised that branch of it now claimed; so far, this grant is defective in the support it might derive from usage, and in respect of this reference is not injurious to the claim of the steward.

The counsel on the other side rest his claim on two points : 1. The long usage in early times ; and, 2. The resolution of the House of Commons. The very beginning of this usage is equivocal ; it is not according to the grant of the office, for that is given to two persons jointly, both of whom make one officer (in the same manner as the two sheriffs of London make one sheriff of Middlesex), whereas one only executes it ; the same objection might be made to the execution of the office in 1780 ; this renders it uncertain in what right he acted ; the same person might have been at the same time steward of the manor ; and this presumption may be fairly asked of the Committee in such a case, until they shew who was the steward of that day. Before the lordship of the borough was leased out, there could be no objection to the claim of the bishop's bailiff ; and it is easy to account for the practice of the bishops in continuing to bestow grants of the office in the antient form, after the causes of it had ceased, by recurring to the state of things at the time when this in-

quiry begins: The act, 1 Eliz. ch. 19. f. 5. for restraining the power of bishops over their estates, does not extend to grants of antient offices with antient salaries; this power being thus preserved, gave them an opportunity of favouring some friend with an annuity out of their estates, without diminishing the revenues of the see, and at the same time preserved many of the formal appendages of grandeur which distinguished their station, and which the dignitaries of the church have been fond of maintaining (D.) There are many instances of this in the estates of other bishopricks; a question arose in the King's Bench in Easter term 1757, upon a grant of this sort in this bishoprick of Winchester: The bishop's predecessor had granted to Sir John Trelawney the offices of Chief Steward of the bishoprick, and of Conductor of the bishop's men and tenants, with a salary of 100l. per annum: And the then bishop disputed the validity of this grant*. Now, though

* 1 Burr. 219. The bishop had also granted the office of Keeper of the wild beasts in his forests, or Chief Parker;

though the subject matter of these offices had long ceased, yet the offices and salaries having been found by the verdict to be *antient* ones, the court of King's Bench supported the grant as a matter of right, in which the bishop might bind his successors: It is to preserve some evidence of the antiquity, that they always use the accustomed forms in their grants, for they often have no other meaning. Thus in the present instance, though all the powers granted to these patentees might have had their effect formerly, before so great a part of the bailiwick was separated from it by the lease of the borough of Downton, yet after the lease of that lordship, part of them became unnecessary, and could only have been continued in the grant for the reason assigned. The present state of the borough of Hindon furnishes an observation in favour of this claim; that is still in the bishop's hands not leased out, and therefore there has never been any objection made to the power

Parker; but this was found by the jury not to have been an *antient office*, and therefore the court held the grant of it to be void.

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exercised

exercised there under his patent ; because no other person can have a right to appoint the bailiff of that borough.

Then as to the resolution of the House, it is by no means a decision on the *point* ; the evidence of the subsequent usage uniformly practised, affords an argument that it was not so understood by those to whom it was given ; but in the resolution itself, it does not appear that there was any dispute between the parties now contending : If it had stated the rejected return to have been made by the lessee's steward, it would have been to the purpose ; but there is good ground to infer the contrary in the resolution of the preceding year, and that the *mayor* of the borough had set up a claim in opposition to the bailiff. This circumstance lessens the authority, which the counsel on the other side attribute to this entry in the Journals.

But whatever effect may be allowed to the length of possession of this office by the bailiff of the hundred, greater must be given to the possession of the other party, not from the length of time merely, but from

from all the circumstances attending it : It began soon after a resolution of the House, which must necessarily have occasioned an inquiry into the right, was continued for more than a century, and exercised in thirty-two instances, during a period in which all election rights have been carefully watched and pried into, and the powers of returning officers have been much more important, as a seat in Parliament has been a greater object of ambition ; during the greater part of this period, a legislative caution has been provided against usurpations of these offices ; for by 7 & 8 W. III. ch. 25. s. 1. it is provided, " That the precepts shall be delivered to the proper officer to whom the execution thereof doth belong." When all these circumstances are considered, they much overballance a possession of fifty years, doubtful in its original, exercised only in seven instances, in a period in which the office could not have been an object of much competition.

After the relinquishment of the claim for a century, to revive it again by interrupting

rupting an adverse possession of such length, is to enforce a principle destructive of all civil rights; the Committee will incline to adopt all the rules of legal presumption in support of such possession. Which is it more just to presume in fair reasoning on such a subject—that the modern possession was usurped by the steward of the borough, or, that the bailiff of the hundred formerly had his concurrence? Certainly the latter.

The evidence in the cause warrants both these propositions.

First, That if it appeared *indisputably* that the right was in the patentees in 1670, without any evidence by which to presume a change of title, yet the long exercise of the franchise by another would lead a court of law in a dispute between the parties, to decide in favour of present possession; or if this should be thought too large,

Secondly, That from such possession, a court of law would direct a jury to presume a conveyance or release of the right.

First,

First, This is no claim by the crown against the wrongful exercise of a franchise, for no length of possession is a bar to an inquiry by the crown in *quo warranto*, into the right of an office; but in private claims the rule of law will not suffer the possession of a franchise for twenty years to be overturned; upon this just principle, that the long acquiescence shall be considered as an admission of the other's right: The court of King's Bench, in the *Winchelsea* case *, say, "There is an analogy between this and other limitations, confining the retrospect to a reasonable time."

Secondly, In cases of antiquated claims the courts direct juries to presume every thing necessary to the support of present possession, even against grants; but the grant in question is uncertain at best. In an action for stopping up lights, which was tried at Worcester in 1761, before Mr. Justice Wilmot †; the judge said,

* See 4 Burr. M. 1963, and 1965.

† The case of Lewis and Price at Worcester, spring assizes in 1761; this and the next case were cited from a collection of MS. notes belonging to Mr. Justice Buller.

"Where

“Where a house has been built forty years, and has had lights, if the owner of the adjoining ground build against them, an action lies for it; and this is founded on the same reason as when they are immemorial, for it is long enough to induce a presumption, that there was originally some agreement between the parties.” In another action of the same sort*, before the same judge, when chief justice, he said, “Possession for such length of time (which in this case had been fifty years) amounts to a grant of the liberty of making the lights—it is evidence of an agreement to make them; possession for sixty years is not to be disturbed, even by writ of right; and if the possession of the house itself cannot be disturbed, it would be absurd to say, that the enjoyment of the lights might.”

In an action for diverting a water-course, tried before Lord Mansfield, in Surrey, in the summer of 1782, his lordship said, “An incorporeal right, which,

* The case of Dougal and Wilson—Sittings after Trinity Term, 9 Geo. III.

if existing, must be in constant use, ought to be decided by analogy to the Statutes of Limitation *." If in this case, any man should ask for the deed or evidence of an agreement between the parties, the answer would be, that the long relinquishment of a right that is valuable and in use, is an evidence as effectual as that of *hand and seal*.

An argument has been drawn from the return of 1780, as if that act had given possession of the office to the bailiff of the hundred; but it is enough to state the nature of that transaction in answer to it; the deputy of the deceased steward having refused the precept, it was carried to Mr. Duthy, merely in order to get some person to officiate †; his conduct had no symptom of a claim of right, or of opposition to the steward's authority, for he declared himself willing to resign, if any other would take the office; even if it had been

* Mr. Erskine, who cited this case, had been counsel in the cause.

† This circumstance was not denied.

otherwise,

otherwise, such an act of possession during the vacancy of the stewardship, could not have had any effect: If the freeholders had thought proper to dispute his authority, and of themselves had returned the members to the sheriff, perhaps the House would have held the return good, if single*.

On the part of Shafto and Conway, it was observed in reply, That the presumptions asked for by the counsel on the other side were necessarily excluded by the nature of the question, which arises out of deeds that depend on the construction of law, whereas the use of presumption is to supply the defect of evidence. The true question is, whether the Bishop has granted the office of bailiff of the borough by his lease; a construction of it is offered from the original usage against this lease, this is objected to, because it is said the office is *incident* to the grant; but no authority has been cited in support of this argument (E). They likewise resort to

* The return stated in p. 122. as an irregular return, seems to have been of this sort: There were many such in the Parliaments of Charles II.

a presumption, that this usage might be with the licence of the steward, or that the bailiff of the hundred might have been at the same time steward of the borough; but in whose favour is this to be presumed? Of those who have all the books and records of the borough, and could certainly give evidence of the fact if it existed; it would therefore be against all principles of law to admit such a presumption on their side; though if it had been wanting in favour of the opposite claim it would be reasonable, because capable of being rebutted by evidence of the contrary, if it existed, in their possession.

The argument urged from the reference in the patent to the predecessor's right is an objection upon words merely; for that reference is to the *right itself*, not to the manner in which it may have been exercised: By referring to former appointments in the books, there will be found the same connection by reference, up to the time of the Stockmans*.

* The Register was afterwards referred to, in which it was found, that Field's grant was "to hold *in tam amplo modo—quam Gul. Stockman.*"

It

It is immaterial what the dispute was upon which the resolution in the Journals is founded; it is a decision upon the fact, and that alone at this distance of time when the particulars of the transaction are lost, shall be taken to be a decision upon the point: It is impossible to shew who made the rejected return, because having been rejected by the House it was taken off the file and destroyed. — The bailiff of the hundred is adjudged the *proper officer*. How is this obviated? by *presuming* an alteration of the right by the subsequent usage, and they say that even an usurpation so long acquiesced in shall not be defeated. — This is strange doctrine, and not that of the law: It is a maxim that long possession shall not be deemed usurpation; but if it appears by the evidence to be an usurpation, it is never supported: It is as natural and just to presume that the steward of the borough had a deputation from the bailiff of the hundred, as the contrary; but neither presumption is necessary to the decision, for they have not shewn the right to be out of the patentee, which they are bound to do.

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The committee having cleared the court, after some time spent in deliberation, the counsel were called in again, when the chairman informed them that the Committee had resolved,

“ That at the last election for the borough of Downton, Mr. Dagge was the proper returning officer.”

Hereupon the counsel for Bouverie and Scott requested that the Committee would report this resolution specially to the House, at the same time with their final decision *.

This point being established, it became necessary for the counsel for Shafto and Conway to go on with their case on the merits of the election: As their return was disallowed, they are from this time to be considered as petitioners; and in the following part of this case, I shall distinguish them by that name, and the others by that of sitting members, as those terms are more consonant to the order of proceeding.

The numbers on Mr. Dagge's poll being only two for Shafto and one for Conway,

* They did so. See Votes, 19 July, p. 436.

Bouverie had a majority of forty-two, Scott of forty-one over Shafto, and Bouverie forty-three, Scott forty-two over Conway.

The petitioners counsel stated that they should add to their numbers fifty who had tendered their votes for each candidate, and were rejected by the returning officer, which would give both a majority ; but if any objections from the sitting members to these votes should succeed so as to make it necessary to go further, they intended to object to thirty-two of the votes on the other side : They said that it would be unnecessary to bring any other proof of the voter's having tendered his vote to the returning officer, than the poll itself given in to the Committee by Mr. Dagge, in which the word '*Rejected*' is written opposite to the name of the voter : To this no objection was made by the counsel for the sitting members.

There being some doubt among the counsel whether the votes offered to be set up by the petitioners should be objected to separately by the sitting members, so as to obtain a decision from the Committee,

One by one, upon each, before entering upon another, the Committee allowed the counsel for the sitting members to take their own course, and they chose that of reserving their objections till all the votes for the petitioners should be gone through, in order to make them collectively: This method was followed with an exception to the case of one vote, which depended on a question of law affecting so many others, that the decision, if for the sitting members, would have been conclusive of the cause in their favour. It was therefore agreed to treat this question first and separately: It arose out of the following facts.

The late Mr. Duncombe, who died in November, 1779, by will gave his property in the borough of Downton, together with his other estates, "to three trustees * and their heirs and assigns, to the use of them, their heirs and assigns, upon trust, so soon as conveniently might be after his decease, to convey the said estates to the

* Sir Thomas Turner Slingsby, Mr. Charles Philip Jennings, and Mr. Mayer.

use of his daughter Anne Shafto, for her life, with remainder to the trustees to preserve contingent remainders; remainder to the use of Robert Shafto, second son of his said daughter Anne, in strict settlement, with other remainders over." Mrs. Shafto died in 1783, leaving her second son, Robert, an infant. Mr. Shafto, by the authority of the trustees, receives the rents and manages the estates hereby devised, for his son's benefit. Before the last election the trustees executed conveyances of Mr. Duncombe's burgages in Downton, to the several voters, by deeds of lease and release for lives, at stated rents, the sums of which were various.—These deeds were all in one form, which was printed. The trustees stile themselves, in these conveyances, "Devises of the legal estate of inheritance in trust named and appointed in the will of Thomas Duncombe, Esq; of, and concerning (among other things) the lands and hereditaments hereafter-mentioned." The voter's name, upon whose title this question arose, was Thomas Wornell; he voted under one of these conveyances to him of
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an antient burgage in the borough of Downton, for two lives, paying a rack rent, dated 20 and 21 March, 1784.

The counsel for the sitting members contended, That this conveyance gave no title to the voter; which they argued both from the principles established in Chancery, with respect to trust estates, and from the statute of the 7 and 8 Will. III. c. 25. s. 7. which is as follows:

“ No person or persons shall be allowed to have any vote in election of members, by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate; but the mortgagor or *Cestui que trust* in possession shall, and may vote for the same estate, notwithstanding such mortgage or trust: And all conveyances of any messuages, lands, tenements and hereditaments, in any county, city, borough, town-corporate, port or place, in order to multiply voices, or to split and divide the interest in any houses or lands, among several persons, to enable them to vote at elections, are hereby de-

clared to be void and of none effect, and that no more than one single voice shall be admitted for one and the same house or tenement."—They argued thus,—

The estate in the trustees is a mere legal estate, for the purpose only of obeying the will, and they have no other right but such as may enable them to effectuate the devise of their testator ; These conveyances to trustees are very generally made for the convenience of family settlements, of modern times, in order to receive the benefit of equitable constructions, and to avoid the difficulties which might arise from legal distinctions in carrying them into execution ; the trustees are mere instruments of conveyance : This doctrine has prevailed ever since the case of Leonard and the Earl of Suffex, reported in 2. Vernon, 526 (F). On the present occasion they have of themselves (for the *Cestui que trust*, an infant, could not interfere) assumed a power of disposing of the estate absolutely, and have given a freehold interest in it to the voter : Now, it is a principle in equity, that if a trustee conveys to one having notice of the trust,

trust, the grantee thereby becomes a trustee for the purpose of executing it*; which in this instance is to convey to the *Cestui que trust*; the deed itself shews the fact here, for by the description therein given of the trustees, the other party had sufficient notice of the trust; or if other evidence of notice should be called for, full proof of it will be given: Thus the voter has no other interest in the burgage, than the trustees under whom he claims; he, like them, is a trustee for the infant and has no beneficial interest in the thing conveyed.

But the first part of the 7th section of the statute above cited, seems to put the question out of doubt. This statute is general in all its objects; the title of it is, "For the further regulating elections of members to serve in Parliament, &c."—The preamble takes notice of the injuries done to the voters in their rights of election, and to the persons elected†; no words

* This principle may be seen illustrated in the following cases: 2 Vern. 271. 1 Vern. 149. 484.

† The words are, "Whereas, by the evil practices
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words can be more extensive ; the 7th section comprehends estates of every denomination, and in the second clause of it expressly enumerates every place of representation. In short, there is no expression that can be construed to limit the provision to countries, or to except burgage-tenures : The reason of this law is obvious ; the multitude of family settlements in trust was so great, as to create much confusion in inquiring into the legal ownership of estates ; the same difficulty attended mortgages, where, by the usual failure of payment by the mortgagor, the estate becomes in law the property of the mortgagee, though it seldom is so in fact ; the mortgagee, as well as the trustee, being generally out of possession ; the act therefore follows the common practice of men, and in order to prevent a troublesome inquiry

and irregular proceedings of sheriffs, under-sheriffs, mayors, bailiffs, and other officers, in the execution of writs and precepts for electing members to serve in Parliament, as well the freeholders and others in their right of election, as also the persons by them elected to be their representatives, have heretofore been greatly injured and abused, Now for remedying the same, &c.”
into

into the legal title, gives the right of voting to the visible and substantial owner. Trustees having the formal and legal right to the freehold, from whence the franchise is derived, might, upon legal principles, exert it; but as this would be subversive of the ends of their institution, and contrary to the real state of things, the statute adapts the law to the circumstances of the times.

This is as applicable to votes in burgage-tenure, as to those in counties, between which, in the antient constitution, there is a close connection; in both, the right of voting is real and in right of tenure, not personal. The act classes together mortgaged and trust estates; yet a mortgagee sometimes has the beneficial interest, but a trustee never has, and there is therefore stronger reason against his voting, than a mortgagee's. Suppose this question to arise at a county election upon the same facts, it would not be doubted, that the conveyance gave no right of voting, and if so, the act makes no distinction. It is admitted, that these trustees are not in receipt

ceipt of the rents and profits ; if therefore the beneficial interest be in another, the right must be derived from him, and not from the trustees, for no derivative title can be better than the original. Suppose the trustees had themselves claimed to vote, would they have been admitted ? But they claim a great deal more, for though they could not have given three votes in their own persons, they transfer that right to a much larger number. It cannot be contended, that they act according to the inclination of the *Cestui que trust*, because that would be maintaining a right to vote by proxy, a right unknown to the law.

It may be urged on the other side, that the law is not general throughout, because the second clause of this section of the statute has been determined not to extend to burgage-tenures* ; but this is owing entirely to the subject matter of the clause : It is to prevent the multiplication of votes by splitting, which is an unnecessary regulation in burgage-tenures, where it has always been the established law, that no

* In the two former cases of Downton.

more than one vote can be given for one burgage, which cannot from its nature be subdivided.

If in a case of positive law, arguments of convenience could have place, and it should be urged, that the infant would suffer a great hardship here, by losing the advantage of his property, it might be easily answered, that the disability of the infant in this case, is no other than that which all infants suffer.

The counsel for the petitioners argued thus :—After observing, that it was strange that this objection should come from a quarter in which the same means * had been employed to derive advantage from a trust-estate, they said,

That it was an established principle, both in law and equity, that the owner of the legal estate has a right to make what use he will of it against all persons, except the *Cestui que trust*; that till very mo-

* Lord Radnor had received a grant from the trustees of the late Lord Feverham, of all the burgages in their possession, and had granted them out to the several voters.

dern times, he might have been justified in the courts of *law*, even against him, and that he alone can complain even now of any misapplication of the trust. There is no instance where the courts of law have gone further, than to enforce the maxim, that a trustee shall not defeat the purpose of his trust; they always give effect to the legal title, conveyed by a trustee in ejectments, or any other actions brought before them (G). The rules which prevail in the court of Chancery, in cases of trusts, are laid down and practised for the benefit of the *Cestui que trust*, and originate in disputes between *him and the trustee*; they are peculiar to such disputes: Thus it is, when a party would set up a conveyance from the trustee against the *Cestui que trust*, he shall derive no advantage from it as against him, though as to every other purpose it may be effectual: It would have been more to the purpose, to have cited a case in which this principle had been enforced, on the complaint of *third persons*, but none such is to be found. But further, the acts of the trustee

tee are not void in any case ; they are valid till questioned by him that right has : Now supposing all these deeds to be voidable by the infant when he comes of age, the Committee will surely not anticipate the questions that may, in possibility, only arise when that happens ; especially on this occasion, where it would be in favour of one who is contriving thereby to overturn the future rights of the infant. At present there is no complaint by the *Cestui que trust*, but on the contrary, there is no room to doubt that the trustees have acted for the benefit of his estate.

It is argued, that as the particular object of this trust is to convey to the infant at a future period, the trustees therefore can have no power but for the simple act of conveyance ; But it is the *Cestui que trust* alone who can say this ; as to all others, the estate is fully in the trustees (subject to an account to the infant) till they do convey it ; with an exception only to such acts as would disable them from executing their trust, but even then on the complaint of the infant only, or in his behalf.

Exclusive

Exclusive of the statute, there would be little difficulty in deciding this question in Westminster Hall: In order to clear the doubt raised upon the 7th section, it will be necessary to consider the rules which have always prevailed in the construction of statutes, and which are as fixed as the law. One is, that the judges are to consider the old law, the mischief, and the remedy; Another, that a statute is not to be extended beyond the mischief to be prevented: Another, that if absurd or dangerous consequences would follow from the direct meaning of the words, they are not to be followed, but are to be construed so as best to effectuate the object of the law; these are laid down in Blackstone's Commentaries*. Each of these rules might be illustrated by the case in question; it is not within the express words of the act, nor within the mischief to be prevented, and very dangerous consequences would follow from deciding that it is, for it would destroy all the burgage property in the kingdom, and that is so extensive as to be

* 1 Black. Com. sect. iii. of the Introduction.

of general * concern. A little experience in legal decisions shews the necessity of construing statutes by the rules of law, and of conforming to preceding determinations. It is well known to have been determined, that the second clause of this section (from whence this statute has received the name of the *Splitting Act*) does not extend to burgage-tenures; yet the words of that clause are much more extensive than those of the other, and include by name every place represented: This alone is sufficient to shew, that something besides words is to be attended to in the construction of a statute. The case on the statute, 13 Eliz. ch. 10. s. 3. of ecclesiastical leases, is an illustration of the rule†; that statute enacts, that certain leases by ecclesiastical persons *shall be void to all intents*; yet when the question arose upon a lease for longer term than the act allowed, the judges held, that

* It is said in the argument in 1 Doug. Elect. 224. that there are about twenty-nine burgage-tenure boroughs.

† This case is put in 1 Black. Com. p. 87. (5th edit.) who cites 3 Rep. 60. Co. Lit. 45. To which may be added 10 Rep. 58.

as the mischief to be prevented was that of long leases to the prejudice of the successor, the lease was void as against the *successor only*, but good for the life of the incumbent the grantor.

The property, consisting of burgage-tenures, could not have escaped the consideration of the legislature at the time when this statute passed, yet they have not included it *in words* in this clause; the mischief it intended to prevent was peculiar to county elections, in which a multitude of persons used to vote for freeholds, who had no interest whatsoever in the land; this abuse depended on the several laws upon county elections.

The first legislative regulation of the right of voting in respect of freehold, (8 Henry VI. ch. 7.) restrains this right to freeholders in counties having an estate of 40s. a year; by the construction of which statute, it was thought, that if a man had other estate to that amount, with *any freehold*, it was sufficient to justify his taking the oath; which the sheriff was empowered to administer. Two years afterwards, by
stat.

M

correct

correct the defects of county elections.

—It is not at all essential to a burgage that the voter should receive any profit from it; it is the quality of the soil to give the franchise, which does not depend on the circumstances of him that holds it; the grantees of burgages are frequently known not to be in receipt of the profits of the estate; and if no man is to vote at these elections but he who receives an income from his burgage, that condition alone would, in many cases, render the property useless. Many undoubted burgages give no profit at all, both here and in other places, as in Old Sarum, Knareborough, &c. scites of houses, deserted shambles, gravel-pits, and (here in Downton,) a pool of water, give the right of voting; they have no other value but that of representation: It was not the intention of the legislature to annul this right inherent in property, because it might become unproductive: It is only in *counties* that the qualification must produce a profit to him who claims to exercise it. Now, if this statute should be construed to extend to burgages, it will in effect

effect destroy all the burgage property in the kingdom, though for upwards of seventy years it has never been understood to extend to it: Perhaps a consideration of these consequences operated in those determinations by which the second part of this section was held not to affect burgage-tenures. It is well known, that till the approach of an election, he who has the ruling interest in these places is in possession of the burgages himself, and grants them out to the voters but a few days before he makes use of them; if, therefore, these words "conveyances in order to multiply voices, or to split the interest in houses or lands, &c." were considered to affect this tenure, it would give to the holder of one burgage an equal right with him who has forty (K). Upon what principles then can it be said, that the first clause of the section is to affect burgage-tenures, when the second does not? The Committee will consider the constant usage of Parliament from the time of passing the act, as a construction of it binding upon the present times, and stronger than the most ingenious arguments

in speculation. It is a strong confirmation of the foregoing argument, that Judge Blackstone, whose authority is justly respected, and who had made the law of elections his particular study *, in that part of his Commentaries in which he treats of the rights of election, (vol. 1. p. 173) enumerates the qualification given by the particular clause now under consideration, among those which are peculiar to counties.

But admitting, for argument's sake, the force of the reasoning urged on the other side, and that the question had arisen at a county election, it ought to be decided there as it is now contended for; the statute does not include this case. It provides, that no trustee † who is not in actual re-

* He formerly wrote a pamphlet, intitled "Considerations on the Question, whether Tenants by Copy of Court Roll, according to the Custom of the Manor, though not at the Will of the Lord, are Freeholders qualified to vote in Elections for Knights of the Shire."—This pamphlet was occasioned by the agitation of the above question in the Oxfordshire election in 1755.

† See page 149.

ceipt of the profits shall vote, but that this privilege shall belong to the real owner when in possession; this is very different from enacting that there shall be *no vote for a trust estate*. The statute does not say the right shall be lost, or not used, but that where there is in fact a *Cestui que trust* or a mortgagor, *in possession*, he only shall vote: For before this statute, the owner of the *legal estate* might have turned the beneficial owner from the poll; till then, no *Cestui que trust*, in strictness of law, had any right to vote, and the old rules that formerly prevailed on the subject of Uses, prevented him from exercising this act of *legal ownership* over an estate in which he had, in contemplation of law, but a fiduciary interest (L.) Thus the words and spirit of this law are fully answered, when applied to those cases only in which there happens to be a mortgagor, or *Cestui que trust* in possession; where that is not the case, the law may be said to have no operation. It will not be denied, that a woman in possession may give a right to vote which she cannot enjoy herself; this case clearly illus-

trates the argument, that where the right is inherent in the *property*, it does not depend upon the circumstances of the person holding it; if it did, all those freeholds in trust under the disabilities of infancy and sex would be disfranchised.

By *receipt of the rents*, the statute cannot be supposed to mean the hand that actually receives them,—that would be too absurd; the *Cestui que trust* is allowed by this statute to vote, not because he does in fact receive them, but because he is intitled so to do: In the present case, no person is intitled to receive them but the trustees, accountable hereafter to the infant, and therefore they are, according to the statute, the persons in receipt of the rents: Though no direct proof has been given of the income's coming to their hands, yet Mr. Shafto's actual receipt of them is in their right, and by their authority; and this leads to an answer to the question, whether the trustees could personally vote for this estate. But supposing the trustees not to be in receipt of the rents, the counsel on the other side have not shewn that any other person

person is, (for the infant certainly is not) and till that is done, they cannot avail themselves of this clause of the statute, which does not absolutely annul the right of the trustee, but transfers it to some other who has the substantial possession, wherever such person appears.

On the day after the counsel had finished their arguments, the Committee resolved,

“ That the vote of Thomas Wornell was good :”

At the same time that the chairman informed the counsel of this resolution, he told them that this was not intended to preclude any other objections to the vote, but simply to determine upon that which had been argued.

As soon as this determination was given, the counsel for the sitting members agreed to admit twenty votes upon the poll for the petitioners, against whom they could make no other objection than this of a conveyance from the trustees ; likewise one cross vote given for *Bouverie* and *Shafto* : So that the poll in this stage of the cause appeared to have,

For Bouverie	44	} disputed.
Scott	43	
Shafto	21	} allowed.
Conway	20	

Many objections were raised against the other votes of the petitioners, as their counsel were going through the evidence necessary to establish them; this was done by proving the voters possessed of freeholds in antient burgages within the borough, paying the accustomed quit-rents to the lord: The chief instrument of evidence used for this purpose was a quit-rent roll in Mr. Shafto's possession, of all the burgages in Downton; this had been copied from one belonging to Lord Feversham, in the year 1745, by his then steward, for the purpose of collecting the chief or quit-rents payable to the lord by the burgage tenants; Lord Feversham being at that time lessee of the lordship under the bishop; It passed therefore as authentic evidence against all persons claiming under Lord Feversham. In this roll all the burgages were numbered, and generally described by the name of

of the then owner, or of his predecessor, or sometimes of the occupier ; opposite to which was placed the sum of the quit-rent due therefrom : Parole testimony was adduced by the counsel to identify the premises transferred to the voters, (the title deeds being produced) and to connect them with the quit-rent roll. This sort of proof naturally lay open to such objections as the ingenuity of counsel is ready to suggest ; such as, to the entirety, antiquity, or identity, of the burgage, or to the witnesses, or the evidence ; many of these arose on mere questions of fact, which were either soon disposed of, or terminated in no point of law, and therefore I have not thought them worth reporting. All those from which any legal question arose I have preserved, and I hope faithfully.

The number of votes to which substantial objections were made on the part of the sitting members, was at length reduced to seventeen, as following :

To eleven, that their tenements were only subdivided, and uncertain parts of burgages.

To

To two (one of whom was likewise included in the preceding eleven) that they were paupers.

To four, that the titles to their burgages were deficient, which depended on several questions of fact; thus,—To the first of these, that a piece of ground, making part of the burgage, had been taken from it, and was not assigned to the voter; To the second, that it never belonged to a family from whom the title was derived; To the third, that it never was held by the person to whose name it was referred in an entry on the rent-roll; to the fourth, situate in the main-trench *, or bed of the canal, that the burgage meant to be described in the roll was not this burgage, but one in a similar situation, purchased by the late Lord Feversham, which gave a vote for the sitting members: These disputed facts occasioned much argument, and employed much time, but the decisions upon them, from their nature, do not fall within the scheme of these Reports; for which reason I only give a summary state of them.

* A canal communicating with the river Avon.

To another of the seventeen the objection was, that the burgage belonged to the trustees of the late Lord Feverham, having been purchased by him ; this depended on a matter of law.

The objection to the eleven was treated in the argument as one, and they were all classed together, although their circumstances were in some respects different :

Five of these burgages went by the name of Farr's, having been formerly sold to Sir Charles Duncombe by one Farr. The description of them in the several deeds to the voters, was in the form following, which is that of the grant to Thomas Wornell, viz. .

“ All that antient burgage, consisting of a house and garden behind the same, situate on the north-side of Downton-street, in the county of Wilts, now or late in the tenure or occupation of James Hill, yeoman, formerly Farr's.”

The other four were held by different occupiers, whose names, with the situations, were inserted in the deeds.

The

The Court-book of the borough was referred to, in order to prove the title to these burgages : In an entry of the 10th of April, 1706, there is a presentment of the descent of five burgages and a half from Nicholas Farr to Roger Farr, the rent five shillings and six-pence : On the 21st of April, 1708, is a presentment of the alienation, by R. Farr to Sir Charles Duncombe, of these five burgages and a half ; the entry in the quit-rent-roll, to which they were applied, is thus : “ For that which was Farr’s—5s. 6d.” Farr’s at present consists of five houses, with gardens adjoining to them, three are situated on the north-side of the street, and two on the south * : A surveyor called on the part of

* These burgages are mentioned in Mr. Douglas’s case of Downton, vol. 1. p. 220. which has given me occasion to do that which, perhaps, will happen but once,—to correct a mistake (a trivial one) in that book : It is there said, that these tenements consist of *land, without divisions* ; So of Legg’s farm hereafter mentioned : The nature of the question then agitated did not make it necessary to attend to this minuteness of description, and the mistake might perhaps be in the evidence, not in the author.

the sitting members*, who made a survey of the borough in 1745, by Lord Feversham's directions, in order to ascertain his burgages, produced the plan he then made, the names and descriptions of which he took from a rent-roll kept by his lordship's steward; his plan describes them in two articles, those on the north-side in one, and the burgage-rent three shillings and six-pence; and those on the south-side in another, and the burgage-rent two shillings: He made three divisions of this last, because it was then intended to make three tenements of them in future. It had always consisted of five separate tenements in the memory of the oldest person living.

The trustees of Mr. Duncombe had granted five burgages out of Farr's, for which five persons tendered their votes: No evidence was produced on either side, on the subject of the half-burgage included in these tenements.

Four burgages had been granted by the trustees out of some meadow land that went by the name of the White Horse;

* But not for this purpose.

the description of the premises in the deeds, under which the voters claimed, was the same in all the four, viz. "All that antient burgage, situate or being within the borough of Downton, in the county of Wilts, part of the land belonging to the White Horse." The entry in the quit-rent-roll for this land is thus, "G. Eyre, for part of that land belonging to the White Horse,—19s. 6d." which is the rent of nineteen burgages and a half; whatever the antient divisions may have been, it has not now so many. On the side of the sitting members it was denied, that there were any divisions at all, and this point occasioned some dispute in evidence, which however did not alter the line of argument on the principal question. Mr. Bell, a surveyor, called on the part of the petitioners, who had known Downton about four years, and had surveyed Mr. Shafto's property there, said, there appeared plain traces of fourteen divisions in this land by large bound-stones, called there *Meer-stones*, which were placed 20, 40, and 50 yards asunder, and seemed very antient; and that

that eleven of these divisions were made by fences (but on comparing the evidence of both sides, I find a doubt, whether six of these meer-stones belonged to the White Horse, or to an adjoining meadow called Bulham Mead.) He said, a bound-stone is always a guide to a surveyor in making his plan, who draws a line from stone to stone: While making his survey, he derived the information he wanted from friends of Mr. Shafto, but had been accompanied by some others, for it had been publicly made, and employed him for some weeks.

John Smith, aged 73, who had lived all his life in Downton, a witness called on the part of the petitioners, remembered these meer-stones from his childhood, and had heard old people formerly say, they had always known them; but he could not tell how many divisions there were in this land, nor how many burgages; he had heard there were nineteen.

Mr. Webb, a surveyor, called on the part of the sitting members, who had taken a hasty survey of the place in question by
their

their direction while this inquiry was going on, said, he had no doubt but that ten of these stones had been placed there to mark out an old ditch, and five of them for the boundary of a stream of the river called the Trench. He had been accompanied in his survey (which he made in two hours) by friends of Lord Radnor.

John Fanstone, an old inhabitant of Downton, aged upwards of 70, said, he always understood that they were the boundaries of the ditch, not of the burgages.

Samuel Bailey, an inhabitant of Downton, aged about 40, examined on the same side, said, he had always heard that these stones were to mark the water-course. On the same side a deed was produced, dated 20 March, 1673, by which part of this land had been leased by Mr. Eyre to Mr. Ash for 1500 years, wherein these stones are described as the boundary between their respective lands.

Two burgages had been granted by the trustees out of land called Legg's Farm; the description of the premises in both
I deeds

deeds was as follows : " An antient bur-
gage, situate or being within the borough
of Downton, in the county of Wilts, part
of Legg's Farm, formerly in the possession
of J. Plasket *."

The entry in the quit-rent roll for this
is thus, " Anthony Duncombe, Esq; for
that which was Legg's, in J. Plasket's pos-
session—10s."

Mr. Bell, the surveyor, said, there ap-
peared marks of this land's having been
antiently divided into ten parts, some of
which divisions were more plain than
others.

There was no evidence of more than
one vote's having been given and allowed
for either of these three estates of Farr's,
the White Horse, and Legg's, at any for-
mer election †.

Under

* In the election of 1774, Mr. Duncombe had
granted *quarters of burgages*, out of Farr's and Legg's,
for each of which a vote was claimed; this occasioned
a very different inquiry from the present, and the fact
being, that there were no marks of divisions into *quar-
ter burgages* in this land, the question was easily deter-
mined.

† In fact, more votes have been given for them, but
they were of the irregular sort brought forward in

Under these circumstances, it was contended by the counsel for the sitting members,

That these eleven votes ought to be rejected, as not being for entire burgages, but for parts only; That the property granted was not in itself capable of giving the right of voting, but that if it were, the terms of the grants were such, that this right did not thereby pass. They defined * a burgage to be *an entire indivisible tenement, holden of the superior Lord of a borough by an immemorial, certain rent, distinctly reserved, to which the right of voting is incident* (M).

That if burgage-tenure be the constitution of the borough of Downton, the right of voting must be in the freeholders of such tenements; if *one* entire rent be paid to the lord of the borough for the tenement, there can be but one vote given for it. But even if the rent could be divided with-

1774, consisting of *new* divisions into halves and quarters of burgages.

* See 1 Doug. Elect. 217.

in

in time of memory, and burgages could be granted out by a division of that property for which the entire rent is paid, yet no such division has been made here, for the rent is not apportioned, nor even subdivided, in the grants. The voters in question are not severally possessed of burgages, for no rent is specifically due for the premises severally conveyed to them, but generally for all the estate taken together.

If there are five houses upon land that pays a rent of 5s. 6d. the rent of each house is not ascertained; the attempt therefore to raise five votes from such a tenement, is to split the entire burgage.

The origin of these burgages was by a lord's granting out his lands to his tenants, for the purpose of their dwelling together in one society or town*, and each tenant thereby became a tenant in burgage, whether the property he held was great or small, or consisting of one house, or twenty, or of none at all; for if one burgage has twenty houses on it, that does not alter the right

* See before, p. 99, 100.

of voting, which allows one vote for a burgage; and the franchise being annexed to the soil, is invariable, though the tenement may change its appearances. A grant* has been produced in the course of this cause, which conveys "All that antient burgage, consisting of *three houses, &c.*" which shews, that there ought to be no reliance on a division of votes, according to the number of houses or tenements on a burgage. This is also evident from Littleton's Tenures, sect. 162, and 163. "Tenure in burgage, is where an antient borough is, of which the King is lord, and they that have tenements within the borough, hold of the King their tenements; that every tenant for his *tenement* ought to pay to the King a certain rent by year, &c. and such tenure is but tenure in socage.

"The same it is when any other lord is lord, &c."

The rent-roll shews these rents to be entire rents; if they had ever been separated, is it to be conceived, that the owners

* The case of Theoph. Lewis; there were others of the same kind.

would

would not have preserved the evidence of the separation? It has been done in one case in this cause; two burgages, held by persons of the names of Warden and Adams, were separate burgages united by one occupation, and so continued long, but are now separated again: Here the fact is ascertained by evidence, and the same thing might have been done in these estates. Though in Farr's there are separate tenements, and on different sides of the street, yet the rent is not apportioned; it is an undivided rent of what is called in the Court-books, *five burgages and a half*. It is agreed, that in this borough the right of voting is annexed to some estates called *half-burgages* and *quarter-burgages*; but it is likewise agreed, that these are irregular and improper terms, describing in a singular manner the *quantum* of the rent*, without any reference to a similar division of that property which gives a vote. These houses may be of different values, or if they were equal, the tenants cannot apportion the rent, for the lord may take it

* See 1 Doug. Elect. 218.

from which of the five he pleases. Rents cannot be apportioned, nor services divided, without the leave of the lord ; but a separate burgage rent is not even reserved in any of these grants. It is contended, that a shilling rent makes a burgage, that there are as many burgages as shilling rents, and that till the subdivision runs lower, it is a lawful multiplication, because ten shillings rent must necessarily make ten burgages ; but the state of the borough contradicts this, for the *half* and *quarter*-burgages, which give the right of voting, are allowed to be good burgages. If these are entire burgages, and only called otherwise from paying smaller rents, why may not that be one burgage only which pays a larger rent, when it is an entirety ? The one is above, the other below the common reservation. Besides, there is an insurmountable difficulty in the present case, in the odd six-pence of the rent for the half-burgage in the farms of the White Horse and Farr's ; these six-pences must be disposed of, or accounted for, before the coun-

fel

fel for the petitioners can establish this division on their own principles.

There is no substantial difference between the divisions made at the last election and those of the year 1774 *, which the Committee of that time determined to be bad ; the division then made into quarter-burgages was no other in principle than this, viz. a division into parcels, which parcels were not proved ever to have had the right of voting annexed to them ; in which view it signifies little, whether the division be called a burgage or a quarter-burgage ; in both cases, it wants the essential qualities of an entirety of rent, and local separation.

These observations are applicable to all the eleven, but the three classes are different : The conveyances of the White Horse, and Legg's, are deficient ; they give no description of the subject conveyed, that can be affixed to one place more than another. This is such an absurdity as no argument can support. It may be said, that the grantees might, by their own acts, remedy this defect, and ascertain, by their own

* 1 Doug. Elect. 219, 220.

election, that which the deeds leave at large; but this rule cannot have place here, because there is no doubt on the *face of the deed*, the doubt arises from matter *dehors*, viz. that there may be more than one burgage in each of these farms; and if so, neither is properly described. But admitting this rule for argument's sake, and that the uncertainty of the grant might be cured by the election of the grantees, they ought to have proved the order of priority of the several grants, to enable them to make this election with effect. There is a still further objection to this argument which is unanswerable; according to this rule, the grantee has no burgage till his election; therefore an election ought to have been made before the time of voting under the grant, and to have been proved in this cause; for the want of this, most clearly these votes are bad, or it must follow that a man may vote for a burgage without any title to it.

Where a thing lies *in grant*, as if a man grants to another "an acre of wood out of his great wood at D." without particularly describing

describing the acre, the grantee is to do the first act, and may take what acre he pleases, but till this election, the grantor may still cut the wood in any part; but it is otherwise after the grantee has elected his acre: The case before us is of this sort, and till such election made, the whole of these burgages remained in the grantor: Which leads to another objection to these votes: The grants in question are of land, and by the statute conveyance of lease and release (N.), in which there is no livery of seisin, the grantee being supposed in possession under the lease: But no possession can possibly be had under a lease which does not describe the subject to be possessed, and here is therefore nothing upon which the release can operate, and so both are ineffectual and void.

The evidence upon the White Horse votes only makes fourteen divisions at most, but the argument requires at least nineteen; and of these fourteen, six are by some supposed to belong to Bulham mead: Now if they affect to know the boundaries of the burgages, why are they not described? The
same

same method of division that makes four in the White Horse, can make 19 there, and ten in Legg's.

The counsel for the petitioners did not deny the definitions and positions on which the foregoing argument had proceeded, but the conclusions drawn from them : They argued thus,

It is not necessary in the constitution of a burgage, that the rent should have been always *distinctly and separately paid* ; this is certain, and proved by the usage in Down-ton, and in every other burgage-tenure borough ; for if it were, all the great estates in them must soon be reduced to the right of one vote only, because the principal owners always pay the rent of all their burgages in one sum to the superior lord : Thus, as Farr formerly paid 5s. 6d. the rent of his five burgages and a half, in one sum, so Mr. Shafto pays the aggregate sum for his fifty or sixty (or whatever the number may be) to the lord of the borough : The mode of paying the rent is therefore not conclusive evidence of the union or separation of the burgage : It is sufficient,
that

that evidence of the separation *in fact* remains ; and upon this the question principally turns.

As much stress has been laid upon the evidence of the quit-rent roll, it is necessary to caution the Committee against giving into that use which the counsel for the sitting members have made of it : It should be remembered, that this roll is no more than the rule of collection given by the lord of the borough to his steward for collecting the quit-rents ; that the object of it is to ascertain the *quantum* to be received by him, without regard to the quality or proportion of the different rents ; that it is evidence of such a nature as could not have been produced by the opposite party, but only by those contending with them, and being made by their predecessor, *whose estate they have*, should be construed less favourably for them *, who are like-

* The irregularity of these expressions *they* and *them*, made use of on this occasion, and in other parts of the cause, as applied to contending representatives, was tacitly acquiesced in on both sides, and is justifiable only on the principle of considering this cause, what in fact it was, a dispute between two families, rather than between two representatives.

wife in possession of the lordship, and most probably of other more authentic evidence of the subject in dispute.

If the acts of the lord of a borough, who in his receipt joins together a number of rents, were to determine the quality of the rents, it would be in the power of the lord to regulate the majority as he pleased. It has been determined, that a tenant cannot compel his landlord to give him a receipt (O.); but if he does give one, he may dictate it in his own terms. This rent-roll is to be considered in this character, when relied upon by the heirs of Lord Feversham; that alone does not sufficiently distinguish the several burgages, but the other evidence connected with it is sufficient. The reputation in the borough is, that the rent of a burgage is a shilling; but to this there are a few exceptions, which probably were in their origin an abuse, but have strengthened into prescription by length of usage, and are now too strong to be called in question. Notwithstanding this, it is natural to suppose that there were in the beginning as many burgages as shilling rents, and

and it cannot be doubted, that every burgage gave a right of voting. Conformably to this idea, Farr's estate is called in the borough books *five burgages and a half*; it is proved by the oldest inhabitant of the borough to have consisted always of five separate tenements *, and Lord Feversham intended to have made six of them; the surveyor † produced on the other side proves, that in a roll more antient than that from which the present was taken, the estate was entered in two divisions, and the rent apportioned accordingly, one part paying 2s. and the other 3s. 6d. This circumstance alone shews, how inconclusive the rent-roll is on the present question. This is the evidence produced from Lord Feversham's papers, and the effect of it is equally applicable to all the three estates: Why should the Committee be more convinced of the entirety of the rents of 10s. and 19s. 6d. than of the rent of 5s. 6d.? The rent-roll is now proved to be undecisive as to one of them, and may therefore be supposed so in the other two; it is at

* John Smith's evidence. † See p. 173.

least just to suppose it in favour of Mr. Shafto, who has not the means of discovering the fact with more certainty, as those who oppose him have.

It is as true that a plurality of burgages cannot make *one*, as that one cannot make a *plurality*; therefore, if there is *any* evidence of the severalty of the burgages, it is to be presumed that they have been always so held, and that the unity of the rents has arisen merely from the unity of possession, for the convenience of both parties paying and receiving them.

As to the votes for the White Horse, and Legg's, the evidence is of a considerable division in the former, in the latter, of a division according to the number of burgage rents; the parole evidence, as far as it goes, is in confirmation of this division, and there is none to the contrary, except by inference from the rent-roll. A right of voting does not depend on the state of the burgage,—if a house or wall falls down, and is not rebuilt, or the remains of it are removed, the *tenement* is still the same; in such cases what can be better evidence than

that which is furnished by antient bound-stones? Little credit will be given to a survey hastily made for the purpose of one party, while this question was in agitation, when compared with one deliberately taken without any view to this dispute; nor will the subject admit of the opinion given by Webb upon the bound-stones*: A water-course was never known to be bounded by meer-stones, it marks and bounds itself.

The antient state of the White Horse farm is now unknown; it probably was an inn, the owners of which, as their business increased, extended their premises by purchasing the adjoining land, piece by piece, which they incorporated with their own; and this being done at a time when the value of burgages was not more than that of other land, no great care was taken to preserve the marks of the boundaries. In this manner nineteen are got together; do they therefore become *one*? No, each preserves its burgage qualities, of which nothing but an act of Parliament can deprive it.

* See p. 175.

It

It is said, the deeds do not ascertain the burgages by boundaries ;—it is not necessary : If there is but one burgage in the White Horse, he who received the first deed of the four became intitled to it, the second to another if there is more than one, according as he might choose, and so of the rest ; and their choice would be good against the grantors, and every other person.

This observation is equally applicable, and *a fortiori*, to Legg's farm.

The difference between establishing the division of aggregate burgages, and the entirety of those whose names import a division, consists in a rule of evidence which the state of this borough, and the proofs in this cause require the Committee to follow ; It is this—Where one rent includes a *number of burgages*, it is to be presumed, that the burgages are separate, as the name imports, till the contrary be shewn ; but where a divided rent is paid for the nominal *division of a burgage*, there it is to be presumed to be a real division of the burgage, till proof be made of its entirety.

It

It is said to be the same question as that in 1775, but it is not possible to shew a resemblance between the two cases; Mr. Duncombe had then granted quarters of burgages *eo nomine* out of these lands, but there was no proof or reason to presume, that they had been ever so divided, or that votes had been given for such estates; and there can be no doubt, that a vote cannot be given for a *part* of a burgage.

The Committee resolved—Not to admit these eleven votes *.

The objections to the two paupers were different: To one that he had received parish and other charitable relief, to the other that he had partaken of the distribution of a private charity, called *Stockman's charity*; the former was one of the above eleven which the Committee rejected upon the

* Before the Committee proceeded to deliberate on these votes, they desired to see the conveyance from Farr to Sir Charles Duncombe, as far as concerned the description of the premises now called Farr's; but they were told, that search had been made for it, and it could not then be found.

other objections*; it is therefore unnecessary to enter upon the state of this objection. The case of the latter was as follows:

In the year 1626, one William Stockman, of Downton, by a deed of feoffment, gave certain lands to seven feoffees, to the uses and trusts named in a schedule making part of the deed; in this schedule are several *Items*. The first provides for perpetuating the trust; the second directs, “That the rents shall be distributed yearly among such poor craftsmen and poor labourers as shall be furcharged by children within the said parish, and for their relief, as shall seem best to the feoffees, with the consent of the vicar or curate of the parish; *and not to go or be employed to the increase of the church-box of the said parish.*” By the fourth *Item* it is directed,

* The circumstances of the case leave no room to doubt this, although the Committee did not express any thing particular upon the votes in their resolution, which was generally given upon all the seventeen votes objected to at the same time: Thus, “Resolve to admit A B, C D, &c.—To reject E F, G H, &c.”

“ That this provision shall not be accounted any abatement of the collection for the church-box, or any other relief of the poor, usually provided for the poor of the parish.”

According to the uniform practice in the execution of this trust, these words have been understood to direct, that this charity shall not be given to those who receive parish relief, and the present trustees who manage the charity never give it to any such : It is a temporary relief; and the custom is to distribute it annually in different sums of money to those whom the trustees think in want of it. The voter, John Edsal, had received it for three years, and within a year before the election.

Against this vote the counsel for the sitting members argued,

That the receipt of this charity shewed the person accepting it to be in a state of dependent poverty ; that such persons are always held to be disqualified by the law of Parliament, because, at the time when representatives received wages, it could not be supposed that such persons were able to

contribute to the payment of those wages ; That there is no resolution of the House concerning any place, that a pauper may vote; on the contrary, whenever the question has occurred, there has passed a resolution to disqualify them ; That there could be no difference in this respect, between the votes of burgage-tenure and those in other rights, for the right, though annexed to the soil, is subject to the legal disqualifications, as women, infants, &c. are held incapable of exercising it. That the case of the borough of Westbury *, 1 June 1715, went a great way to determine this, for in that resolution which is concerning a borough of burgage-tenure, paupers are disqualified. It is thus :

“ Resolved, That the right of election of members to serve in Parliament for the borough of Westbury, in the county of Wilts, is in every tenant of any burgage-tenement in fee, for life, or ninety-nine years determinable on lives, or by copies of court-roll, paying a burgage-rent of

* 18 Journ. 154.

four-pence or two-pence yearly, being resident within the borough, and not receiving alms."

The counsel for the petitioners argued in support of this vote,

That the objection, whenever made, was considered as an unfavourable one, and the determinations have generally restrained the disqualification instead of extending it; that the Journals contain numerous resolutions of rights of election, qualified by the addition of "*not receiving alms*;" from which it is plain, that the receipt of alms is not a general disqualification; if it were, such particular resolutions would be useless: That it is not in any case a disqualification, where the right of voting is not *personal*, as it is in scot and lot, or corporation rights of election; that there is no resolution to disqualify freeholders of a county by receipt of alms, and *à fortiori*, it cannot hold in burgage-tenures; that the counsel on the other side, who had argued in the former question on the ground of this being a territorial right of voting, as annexed to the soil,

could not now desert this ground, and deprive it of one of its incident privileges by the uncertain accidents of the possessor's fortune; That the case of Westbury was not applicable, because the right of voting there was not properly in burgage-tenures, but a mixed right; besides, that resolution passed on the receipt of *parish relief*: That "by receipt of alms" is always understood "parish relief;" but that the nature of this charity was such, that even if this were not a burgage right, or if receipt of alms were a disqualification in Downton, the acceptance of it would not disqualify. In the case of Bedford, reported in 2 Doug. Elect. 94. 113. this matter was fully discussed before the Committee *, and after elaborate arguments of counsel, it was determined, that Harpur's and Hawes's charities did not disqualify †;

* It is hardly necessary to inform the reader, that the arguments in the Bedford case contain all that can be said on this subject. It should be observed, that the decision there passed on a borough where *receipt of alms* makes an express exception in the resolution of the House upon the right of voting.

† See 2 Doug. Elect. 110; 122.

the

the latter of which was a distribution in addition to the parish relief, and in case of the parish, the former more resembling Stockman's. This decision is much more than in point to the present argument, for it passed on a right of voting that is *personal*, viz. in burgesses and freemen: That even supposing the objection well-founded, the party making it should have proved the charity to have been received by the voter after he had acquired the right of voting, which had not been done.

The Committee resolved—To admit the vote.

The remaining vote objected to, the circumstances of which made a question of law, was that of Moses Wiltshire. The question was, whether the burgage for which he voted, (which was a quarter-burgage, paying the rent of three-pence) was the property of Mr. Duncombe or of Lord Feversham. It was proved to have been in Mr. Duncombe's possession from the month of October 1764: A receipt

was produced, signed by Lord Feversham's steward, for an arrear of twelve years quit-rents and for reliefs due to the estate of Lord Feversham, as lord of the borough under the bishop, at Michaelmas 1775, for the burgages which came into Mr. Duncombe's possession on the death of Lord Feversham, under Sir Charles Duncombe's settlement. The receipt was dated January 31, 1776, and after expressing the particulars of the sums therein contained, concluded thus, "In which several sums, the quit-rent of three-pence a year for the burgage tenement, *late Longfield's* is included; which tenement, it is apprehended by the trustees of the said late Lord Feversham, will eventually turn out to have been purchased by the said late Lord Feversham, and not by Sir Charles Duncombe, and therefore the said sums are received without prejudice to the right of the said burgage."

This was the burgage in dispute. The form of the receipt was settled by one of the trustees of Lord Feversham and Mr. Duncombe's agent. If this tenement had
been

been purchased by Lord Feversham, it was clear that it would not have descended with the settled estate to Mr. Duncombe; and the counsel for the sitting members offered evidence to prove this purchase.

On the part of the petitioners it was contended, that the possession of twenty years in their favour, would make a good vote at a county election, and was a sufficient title in this cause against all claims; therefore they hoped the Committee would stop the inquiry *in limine*, by rejecting all evidence of a title which could not be successful in an action of ejectment. This point was much debated on both sides; but as the case in its then state was somewhat entangled with disputed facts, the Committee resolved to hear the whole evidence upon it *de bene esse*, and without prejudice to the point contended for on the part of the petitioners; I have therefore thought it better to state all the arguments together upon the whole case, though in the proceedings of the cause they were divided into two parts.

Lord

Lord Feverham's will, as far as it relates to this subject, is in substance thus: He devises all his real estate, subject to certain annuities and legacies, to three trustees, upon trust, in case of one child only, to convey to such child, on his or her attaining twenty-one; and after providing for the event of more sons than one, he wills, that in case he should leave daughters only, and more than one, his trustees shall convey to them, on their attaining twenty-one. In the codicil, dated in 1761, he wills, "that in case of no son, and more daughters than one, his trustees shall make sale of his estates in Wiltshire and Middlesex, for the advantage of his daughters, and to prevent disputes; and that his kinsman, Thomas Duncombe, Esq; or those who may be intitled to his estate after his decease, may have the refusal of them; and in case he or they shall not accept the terms to be proposed by the trustees, they are then to sell them to the best purchaser."

Upon his lordship's death, leaving two daughters, and without male issue, the trustees did not make the offer to Mr. Duncombe,

combe, nor since his death to Mr. Shafto. A suit in Chancery is depending between him and them upon this devise.

Mr. Duncombe, in Easter term 1764, levied a fine of all the lands which came to him from Lord Feverham: His will has been already stated in the former part of this cause*.

The counsel for the fitting members produced a conveyance, dated 23 May, 1724, from *Charles Longville* to Lord Feverham, of a burgage, consisting of three messuages, with the appurtenances, situate in a part of Downton, called *The Islands*, paying 3d. rent, described to be in the occupation of John Nott, John Snelgar, and Richard Snelgar.

Two witnesses proved, that *Longville's*, or *Longfield's*, (for they seemed to make no difference between the two words) was the name given to three houses lately held by tenants whom they named, which were now conveyed to the voter, and that the same house had been called *Nott's*.

* See p. 147.

Lord Feversham's dying seised, the infancy of his daughters at the time, and that * ten years had not elapsed since their attaining majority, were facts admitted.

Since the election an ejectment was brought for this burgage, on the demise of the trustees of Lord Feversham, and of his daughters and their husbands.

The counsel for the petitioners applied to this burgage the following entry of the quit-rent roll :

“ For *Longfield's*, in the possession of R. Humby,—3 d.”

John Smith, (the same old person mentioned in p. 175.) who had known Downton from his infancy, did not remember any person inhabiting these houses of the name of *Nott* or *Snelgar*.

* 21 James I. c. 16. s. 2. enacts, That if any person intituled to such writ (*as in sect. 1.*) or having such right of entry, be, at the time of the said right first accrued, within the age of twenty-one years, &c. such person and his heirs, may, notwithstanding the said twenty years be expired, (*the limitation in sect. 1.*) bring his action, or make entry, as he might have done before this act; so as such person shall, within ten years next after his full age, &c. take benefit of the same.

The

The counsel for the fitting members argued,

That the property was proved to be Lord Feverham's; that there was no doubt about the situation, and as to the variance between the names of *Longville* and *Longfield*, the latter was the common vulgar pronunciation, and therefore most followed; it was plain they mean the same here, because no evidence was offered of any other *Longfield*.

That if this was admitted to be the purchased property of Lord Feverham, there was nothing to prevent his heirs from recovering it now, and therefore the Committee would not allow the voter to derive a title to it from any other; That the twenty years possession, supported by the statute of limitations*, meant an *adverse possession*; but the receipt shews directly the contrary of this, and that the possession

* By sect. 1st of the stat. 21 James I. ch. 16. No person shall at any time hereafter make any entry into any lands, &c. but within twenty years next after his title accrued; and in default thereof, such person so not entering and his heirs, shall be utterly excluded from such entry.

of Mr. Duncombe, was licenced by the trustees of Lord Feversham, upon condition that it should never operate against his heirs. But supposing it otherwise, and that the statute of limitations did affect the claim, yet this case is within the exceptions of that statute, the parties claiming being infants at the time when their title accrued, and the time allowed them after the removal of that disability not being yet expired: Therefore they could recover now in the ejectment which has been brought. Though the legal estate is in the trustees, yet an infant is not to be barred by any laches of his trustee, his disability is so far privileged. Under this trust the infants are the substantial owners, and in such case the *Cestui que trust* might eject even his own trustee; an infant cannot compel his trustee to make an entry, or to sue for him.

The counsel for the petitioners argued,

That as the facts stand, the claim of right is far from being made out, neither the name of the supposed owner, nor of the occupier, being satisfactorily proved; and
this

this defect alone, in a case of twenty years possession, would be sufficient to stop any inquiry into the merits of such possession. But without entering into the claim of right, the possession is such as must obtain a decision in favour of the petitioners. The receipt is so far from shewing the possession to be with licence, or *conditional*, that it proves all that Mr. Shafto can require from it, i. e. a clear possession by his family for the time required: What is that, as between him and the present claimants, but *adverse*? Possession that is not adverse is either, under another, or for the benefit of another, as in cases of tenancy in common, &c. neither of these is the present case (P). The effect of the receipt is misunderstood, when such an argument is drawn from it; the exception has nothing to do with the *possession*, but with the *right*; it is made in order to prevent the operation of the receipt as an acknowledgment of the right, as it would be without this exception; therefore they are permitted to contest the *right*, but having allowed it to lie dormant for twenty years, the statute of limitation interferes,

interferes, and prevents their prosecuting this right in certain forms of action: They may still, notwithstanding the receipt, bring a *writ of entry* or of *right*, but not an ejectment; and that is a sufficient bar to any inquiry before a Committee of the House of Commons, who ought not to enter upon a cause which the court of King's Bench itself could not receive, for that court cannot entertain a *real* action. The counsel for the sitting member would hardly venture to give this receipt in evidence on the trial of the ejectment; but there is another objection to it,—It is used as the entry of a claim, so as to avoid the effect of an adverse possession; but this is never effectual, unless followed up with an action or actual entry: That alone can prevent the operation of the statute, according to the case in Buller's *Nisi Prius*, p. 100*.

“ If a declaration in ejectment be delivered within twenty years, and a trial had, whereby

* Edition of 1772: It was objected on the other side, that this case was omitted in the subsequent edition of the book, but upon a reference to the last edition, it was found in that.

there

there is lease, entry, and ouster confessed, yet if the plaintiff being nonsuited in that action bring another after the twenty years, that will not be proof of an entry, to bring it out of the statute of limitations, for that must be an *actual entry* *."

The receipt cannot be considered as any agreement on the part of Mr. Duncombe, not to secure his own title; it is no more than a declaration of the party giving the receipt, (who has power to dictate it in his own terms) which, however, he does not act upon or prosecute: Within the eight years which have elapsed since, no step has been taken to prosecute the eventual right, which the exception looks for. Add to these arguments, that Mr. Duncombe levied a fine of the estate in question, since which five years have passed, so that not only the possessory remedy is gone, but all others, for the *right* is barred thereby.

* In the case of Naunton and Leman, 2 Black. Rep. 994. it was determined, that even a bill filed in Chancery is no bar to the Statute of Limitations, and that the claim must always be of the same nature as the estate: This was the case of a Fine and non-claim. See more on this subject, Doug. Rep. 468.

Against this is urged the infancy of Lady Radnor and Mrs. Bowater. This opens two questions: 1. Whether they are the *Cestui que trusts* of this devise; and, 2. If so, whether, even as such, they are not barred.

No man who reads the will can say that Lord Feversham gives the estate, *eo nomine*, to his daughters: It is given to the trustees, under an express direction to them, to offer it on terms of sale to the owner of the settled estate of the Duncombe family, i. e. to the infant of Shafto *: It seems to be directed by an anxiety to unite all the family property of the borough in one interest. None but the infant Shafto can call upon the trustees for a conveyance of the legal estate, because any other application would be to make them break their trust; and though they have not yet made the offer they will be obliged to do it. Therefore the beneficial interest in this trust, *quod* trust, is in the infant Shafto, and if there is any *Cestui que trust*, it is he: The

* See page 202.

daughters

daughters are only intitled to the money derived from the sale, and not to the estate itself (Q). This distinction between the two trusts is admitted in the case of Alston and Wells, Doug. Rep. 741; and Lade's Case, 3 Burr. 1416.

Upon the second point, admitting that the daughters of Lord Feverham are the beneficial owners of the estate, it is unnecessary to argue the question, for it has been already decided in the court of Chancery. The trustees, having the legal estate, must bring the ejectment, and the demise ought to be laid in their names; in that which is brought, though demises are laid from Lord and Lady Radnor and Mr. and Mrs. Bowater, together with that of the trustees, yet they are unnecessary. The trustees were under no disability, and their neglect is conclusive as to the infants; the remedy against them must be in Chancery. In the case of Wyche and the East-India Company, in 3 P. Williams 309. an administrator in trust for an infant had neglected to sue in his behalf within the time; upon a bill filled by the infant when he came of

age, Lord Chancellor Talbot said, "The administrator, during the infancy of the plaintiff, had a right to sue; though the *Cestui que trust* was an infant, yet he must be bound by the trustee's not suing in time, for I cannot take away the benefit of the Statute of Limitations from the Company, who are in no default;—and as to the trust, that is only between the administrator and the infant, and does not affect the company. So where there is an executor in trust for another, and the executor neglects to bring his action within the time prescribed by the statute, the *Cestui que trust*, or residuary legatee, will be barred (R)." The above case refers to another before Lord Chancellor Parker equally strong; And thus the claim, on the part of the sitting members, seems to lie under every objection that can be made to it.

The counsel for the sitting members observed in reply,

That the case cited from Buller's *Nisi Prius* did not relate to this question, because that only shews that a fiction of law, such

as the entry *confessed* in an ejectment shall not prejudice the right of any man *; it is only an illustration of the well known maxim, *In fitione juris subsistit equitas*. But the question here is, whether the evidence by which the possession is proved, does not, at the same time, prove it to be insufficient to establish a title †.

With respect to the trust, that subject is depending in Chancery, and the event uncertain; in the mean time it may be argued, that there is no person answering the description in Lord Feversham's will, as the possessor of the *settled estate* of the

* If any of my readers wish to see this subject more fully discussed, they may consult the case of Wigfall and Brydon, in 3 Burr. 1895. and the cases there cited.

† In the case of Hare and Jones in the King's Bench, Mich. 23 Geo. III. (which is very justly reported in the *Essay on the Nature and Operation of Fines*, p. 187.) it was determined, that no possession with the consent or consistent with the right of another, shall work a title: At least this is a necessary corollary from the doctrine established in that cause; but the point *immediately* adjudged there turned upon the operation of a fine, upon a right not adverse to his who levied the fine.

Duncombe family, because Mr. Duncombe, by levying a fine of the estate, has defeated the settlement; for which reason the trustees must exercise a discretion in this part of their trust; but at any rate, till the offer made, or the estate sold, Lord Feversham's daughters are to be considered as the owners of it.

The Committee resolved — To admit the vote.

The petitioners had now finished that part of their case which concerned their own votes; The decisions of the Committee upon the several objections had reduced their numbers to

41 for Shafto,

40 for Conway,

i. e. 20 disputed votes for each had been established, by evidence or argument.

It therefore became necessary for them to disqualify five votes for the sitting members, in order to obtain a majority over both. In going through this part of the cause, the same course was followed as in
the

the former; all the objections were gone through on one side first, and then received a general answer from the other; this was done at the request of the counsel for the sitting members, who said they were not then prepared with the evidence necessary to answer the objections vote by vote: By this course the decision of the Committee, on the particular cases, was not made till the conclusion of the whole cause*.

The counsel for the petitioners stated particular objections, which extended to 15 votes: There was besides a general one, which extended to 21, viz. that it did not appear that the burgages paid a quit-rent; but this being afterwards established to their satisfaction by evidence on the other side, of a conformity with the quit-rent roll, there remained only the 15 to be considered by the Committee. These I shall state separately.

* Much time was lost by this method, but as it tended to a more particular investigation of the rights of the parties, they are under great obligations to the Committee for their compliance.

1. Reverend James Foster—The objection arose from the form of expression in his conveyance; his burgage (being one of those called *quarter-burgages*, and held by the quit-rent of 3 d.) was conveyed to him in these words, "All that cottage, messuage, tenement, and dwelling-house, paying 3 d. and commonly called *one quarter of a burgage*, &c." This last phrase was said to be improper, and *ex vi termini* importing it to be no burgage; for though the irregular burgages, called *half* and *quarter-burgages*, were allowed and established in Downton, yet this being an exception to a general rule, the expression ought to be adhered to strictly; that this tenement not being described in the common form, but as a *quarter of a burgage**, it was incumbent on the counsel to prove in fact, that the subject of the grant, for

* According to the entries in the borough books, when they were kept in Latin, there seems little foundation for this distinction. Those entries (which I have examined) uniformly describe such burgages by the terms "*dimidium burgagii*,—*quarta pars burgagii*,—*octava pars burgagii*—"

which

which the vote was given, was an entire bur-
 gage; that the contrary being a negative,
 was incapable of proof. This, after some
 little debate, was agreed to by the Com-
 mittee, and the fact was established to the
 satisfaction of the petitioner's counsel: But
 the evidence produced for this purpose fur-
 nished the petitioners with another objec-
 tion, which they insisted upon: This was
 to the title under which the voter held the
 premises. The entry for this burgage in
 the rent-roll * is thus: "John Stride, for
 his own land, late H. Cotton's;" deeds
 were produced, by which Stride and his
 wife conveyed, in 1738, to J. Russell; in
 1741, Russell to John Beves and John
 Gibbs, as joint-tenants in fee; on 26th
 April, 1764, Gibbs conveyed to Reeves, he
 to Lord Radnor in Feb. 1783, and Lord
 Radnor, in June 1783, to Foster. In the
 deeds subsequent to the year 1741, the pre-
 mises are described to be "situate in that
 part of Downton, called the Islands," which
 was the situation of the voter's burgage;

* The time of making it is before stated to have
 been in 1745. See p. 168.

but

but the description in the deeds of 1738 and 1741, is only "in the borough of Downton:" A deed was produced on the part of the petitioners, dated in 1737, by which Stride mortgaged a tenement and about four luggs of ground, "*situate in the islands at Downton,*" to John Beves for 500 years. Reeves was in possession of the burgage from the date of his deed, and voted for it in 1774 and 1779 as his own. The conveyance to Foster describes it as "formerly bought of John Stride and his wife, now in the occupation of William Reeves:" This had belonged to Cotton before Stride's time, and was on the south-side of the street; Stride rented a tenement on the north-side from Mr. Eyre, in which he lived. In the conveyances to Reeves and to Lord Radnor, the "four luggs of ground" make part of the description.

The counsel for the sitting members argued in support of this vote,

That the voter being in peaceable possession, it was *primâ facie* evidence of title, and all that was necessary to shew at the poll, that the title was such as would stand
against

against an ejectment, being a possession undisturbed for twenty years, which made it unnecessary to enter into a minute investigation of the title deeds, for a Committee would certainly inquire no further; That as the objectors do not shew any other person to be intitled, a much less appearance of title would be sufficient: But here was besides a strong confirmation of the title, a voting under it in two contested elections. The want of a conveyance from Beves, who was joint-tenant with Gibbs, may at this distance of time be fairly supplied, by presuming him to have been dead when Gibbs conveyed. That the puzzle endeavoured to be created by the mortgage-deed in 1737, was cleared up by the rent-roll, which in 1745 shews, that it had made no alteration in the state of this property; it is there called *Stride's own*, in contradistinction to some land that he rented.

The counsel for the petitioners argued,

That unless Beves was dead at the time when Gibbs made the conveyance, only a moiety of the burgage passed by it; the presumption asked for could not be made upon a

fact so recent as in 1764, and therefore so capable of proof, if true; if the doubt arose upon a conveyance fifty or sixty years old, it might be reasonable to make the presumption, because of the difficulty of proof; but that reason does not hold here, and for this defect, the vote must be disallowed. But there is another objection equally fatal, arising out of the deeds—The premises described in the deed in 1764, and those subsequent, do not appear to be the same with those in the deeds of 1738 and 1741; if they are in fact the same, it may be proved now; if not, these deeds give no title to the burgage in question. The conformity in the descriptions contained in the mortgage-deed in 1737, and those in 1764 and after, connected with the fact of Stride's being in possession of this which is called "his own burgage," seven years after he is by them supposed to have sold it, raises a strong suspicion, that this burgage is the subject of the mortgage, and that he continued in possession as other mortgagors do; and that some
other

other tenement is the subject of the conveyance in 1738 and 1741.

Therefore the only foundation of the title is the twenty years possession :

But, first, This is not a possession of twenty years : The date of the deed under which this possession commenced, is 26th April, 1764, and Foster voted on 5 April, 1784* ; therefore the term was not completed.

Secondly, If it were, it would not be effectual in this case, because they have shewn this possession to have been derived under a bad title : The principle of the Statute of Limitations, and of the rule by which it is enforced, is, that a long possession *standing alone* is evidence of a freehold title ; but when more appears, as that the possession is founded in something which does not support it, the presumption arising from the length of possession is then done away.

The Committee resolved—That the vote was good.

* The day of election.

2. Alex. Forsyth : He voted for a tenement called *Worr'mead*. The objections were two :

First, That it was a copyhold.

And Secondly, That it was out of the borough.

In support of them, the manor books and other evidence were produced, but in the course of the inquiry it appeared, (somewhat unexpectedly to both parties) that there were *two* Worr'meads ; one acknowledged in the rent-roll, the other (as seemed to be admitted) out of the borough. Upon this evidence a new objection was made, viz. that the tenement conveyed to the voter, and for which he voted, was in fact that Worr'mead said to be out of the borough ; and this made the question for the decision of the Committee. The case occupied a great deal of time, but as the whole consisted of disputed facts, I shall not trouble the reader with an account which could be useful only to the parties concerned, who have better means of information. The Committee held the vote to be good.

3. Jos.

3. Jos. Nicolas—His tenement was objected to as not being an antient burgage ; and as the counsel for the fitting members offered no evidence in support of the vote, it was considered as given up by them, and accordingly was rejected afterwards by the Committee.

4. T. G. Atwater—His tenement was described in the conveyance to be a “ burgage covered with water in the main-trench, formerly Jolliffe’s ;” the objection was, that there was but *one* burgage in the main-trench, and for that, one William Winter had voted on the side of the petitioners *, whose vote had been disputed, but had been expressly allowed by the Committee. The situation of Atwater’s burgage is on the north of a bridge, called Kingston-bridge, which stands upon the main-trench ; that for which Winter voted is on the south of this bridge ; the latter derived his title from Mr. Shafto, the former from Lord Radnor. On the part of the fitting members, the counsel produced entries in the court books of the borough,

* See p. 170.

of the alienations of this tenement *as a burgage* before it was cut into the main-trench and since; they proved, that Lord Feversham purchased this among other property from Mr. Wyndham Ashe—that Ashe's property lay on the north of Kingston-bridge—that Mr. Shafto had no property on the north—that the tenement assigned to Winter was on the south, and that the reputation in the borough was, that the tenement in question was a burgage; a witness, who had been in possession of it twenty-five years under Lord Feversham, swore, that he always understood the entry on the roll to apply to this burgage, and in the roll (in which all the burgages belonging to one person are classed together) the burgage in the main-trench is in company with Ashe's lands, not with Eyre's, from whom Mr. Shafto derived title.

In order to understand this matter more clearly, it is necessary to state the circumstances under which Winter's vote had been admitted. His tenement had been purchased of Mr. Eyre by Mr. Shafto, with
other

other burgages, and was in the occupation of Lord Feversham's trustees, as undertenants to Mr. Shafto, to whom they paid the rack-rent as tenants, and from whom they had also received the burgage quit-rent, in right of the lordship. This was contended, on the part of the petitioners, to be an acknowledgment of the burgage right, decisive in the present dispute. The counsel for the sitting members did not then oppose this, by the same strength of evidence now produced; however they gave some evidence * to shew that the burgage referred to by the roll, was their's on the north of the bridge: The point in dispute was upon matters of fact only, and the Committee upon that state of the question admitted the vote for the petitioners.

The counsel for the sitting members now argued,

That there could be no doubt upon the above evidence, that the burgage mentioned in the quit-rent roll is that held by the voter T. G. Atwater; if so, it is an ancient burgage paying quit-rent, and it is

* See p. 170.

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impossible

impossible for the petitioners either to support a vote for the same burgage, or to prove their own to be a *burgage*; that the admission of another vote for this burgage ought not to prejudice the true proprietor in the exercise of his franchise, for the object of inquiry had been very different in going through the votes for the petitioners, from that which now occurred in their objections to the votes of the sitting members: It was *then* the business of the sitting members only to prevent their establishing *their* votes; and it would have been impertinent in that stage, to have entered into a full defence of one of their own votes, whom the returning officer had received on the poll, and whose right consequently required no defence; That the Committee would not make either party suffer, by complying with the order of proceeding directed by them in the cause, and would therefore reconsider the whole question, as open to them, before they should make their final resolution; That they were not bound to have declared their judgment upon the former votes, and if they had not done

done it on the case of Winter's, and were now to decide upon that burgage, for whom would the decision be? The great strength of the petitioners' case was the payment of the quit-rent on their part, and receipt of it by the trustees; but such payment, when the party is not in possession of the subject of the rent, is no *disseisin*, and the effect of it is done away by the clear evidence on the other side, which shews that it must have happened by mistake; That the question therefore now would be, whether Atwater, or Winter, should remain upon the poll? if they thought the former justly entitled to that privilege, it would never be too late to do justice.

The counsel for the petitioners, after recurring to the state of the evidence upon Winter's vote, denied that the result of the inquiry would be in favour of the sitting members, if the whole question were open to it; but they argued—That the question was in fact already decided; and therefore any arguments on general principles came too late; to give way to them, would be

to break through all rules of judicial proceedings, and would open the door to infinite evasions. Upon the same principle, the Committee might be called upon to revise their judgment upon the case of Farr's burgages, or of any other question in the cause, by a tender of fresh evidence.

That the argument, that no *laches* is imputable to the sitting members, in not bringing their present evidence forward, upon Winter's vote, is a begging of the question; they might have proved every thing on that vote which they have now produced; the case not only called for it, but it is the very thing they attempted, for they endeavoured as fully as they *then* could, to prove the right to be in their own burgage, and the dispute turned upon that fact (for the truth of which they referred to the minutes); and even if they had not offered such proof, they ought not to be allowed to do it now, because they had notice of the objection in the first opening of the cause*, and therefore all the evidence

* The day on which the objection to Atwater was stated by the counsel for the petitioners, was June 22; the

evidence now produced would have been pertinent then ; If they had the means of establishing the vote, and did not use them, the Committee will not now assist them ; but as they had failed then, and still must fail, in proving *payment of the quit-rent*, the decision now, by what means soever formed, could not be different from that before given. The parties are therefore bound by this decision, not only because it is the judgment of the court, but because it passed upon the merits of the case,

The Committee resolved—Not to admit the vote.

5 and 6. Samuel Green and Samuel Clarke : The objection to these was, that the tenements for which they voted were *parts of one burgage*; and, (if this should fail) that the same burgage was conveyed to each, and one vote only of the two could be allowed.

the day on which Winter's vote was opposed by evidence on the part of the fitting members, was June 29.

This consisted in fact only, and upon the evidence produced on the part of the fitting members, the objection was abandoned.

7. H. Barnes : He voted for a tenement which in the election of 1774 was held by two brothers of the names of John and George Russell * ; it then passed for two burgages, but was objected to for that reason, and now was held by the voter as one ; The objection was, that no title appeared from the Russells to the present voter ; and upon the production of the title-deeds, another was raised, viz. that in the conveyance of the part held by G. Russell, it is not described as *a burgage*, in that of J. Russell it is described as *part of* an antient burgage, and therefore, upon the face of the deeds, the voter had only *part of* a burgage, for which no vote could be received.

This objection was answered by evidence, shewing that this land constituted an antient burgage, and that the whole of it was conveyed to the present voter—The

* See 1 Doug. Elect. 227.

counsel for the sitting members said, That if it ever was an entire burgage, (which could not be disputed) it is now by the union of the two parts become entire again, and the franchise revives; that although some incorporeal rights, as certain rights of common or of estovers appurtenant, are lost for ever by splitting the tenement to which they are appurtenant *, it is not so of this franchise annexed to a burgage, which cannot be extinguished in the like manner.

The counsel for the petitioners afterwards gave up their objection to this vote.

8. John Blake—The objection was, that his tenement was not an antient burgage, but a part of the waste got together by degrees, and built upon; but the evidence produced in support of this vote, was allowed by the counsel for the petitioners to have established it.

9. John Webb—His burgage was conveyed to him by one Edsal, of Truro in Cornwall; the deed was printed on a large

* The reader may see this subject fully discussed in Co. Lit. 122. and Turringham's case in 4 Rep. 37, 38.

sheet of paper, in a form common to both parties in this election, which is that of a lease and release for lives, wherein blanks are left for inserting the necessary names and descriptions: The words which filled the blanks of this conveyance were written with a black-lead pencil; those so written in the *release*, were the names and descriptions of the voter and of the persons for whose lives the grant was made, who were described thus—"John Webb, of Langford, in the county of Wilts, gardener"—for the lives of "Shute, lord bishop of Salisbury, and Sir Roger Curtis, knight." The burgage is thus described: "All that antient burgage tenement, with the appurtenances, situate in the borough of Downton, in the county of Wilts, now or late in the tenure or occupation of _____," without the tenant's name. The execution of the deed was attested by two subscribing witnesses; near the place where they signed their names some words were written with the pencil.

The Rev. Mr. Sampson, one of the two witnesses, was examined; who said, the deeds were

were executed at his house in Truro; he did not observe any part to have been in pencil, nor that the words in some lines looked differently from the rest; he thought all had been filled up in the usual manner, and did not observe any thing extraordinary; if he had, he should have looked at them more attentively, but he neither read nor observed them particularly:—He could not say whether they were at that time different from their present state, nor if any date then appeared to the deed or the attestation: No blanks were filled up in his presence; he believed, Edsal at the time of execution said, “that the deeds had been sent to him with the blanks filled up, all except the name,” but mentioned nothing of the particular name, or of any part being in pencil.

Being shewn the pencil writing close to his own attestation, he said he did not take notice of it at the time.

The other subscribing witness was not called, but the counsel for the sitting members offered to call the Earl of Radnor and Edsal himself to explain the transaction:

The

The evidence of both was rejected by the Committee, after hearing the arguments of counsel *. The counsel for the sitting members identified by evidence, Edsal's tenement, and proved, that he had only one burgage in Downton.

Under these circumstances, the counsel for the petitioners, in objecting to this vote, argued to the effect following :

The suspicious appearance of this deed, connected with the evidence, gives good ground to infer, that it was executed *in blank* ; a man must have been very inattentive, to have looked on this paper without observing the pencil ; yet the witness observed nothing remarkable, and was told by the grantor, that the *name* was omitted, —which name, it is fair to presume, was that of the voter : It is a confirmation of this argument, that the other subscribing witness is not called ; to what can this be imputed, but a fear that his evidence would be unfavourable ? in a case too, where every endeavour has been made to support the vote, by contending for the admission of

* Hereafter stated in p.

evidence which the Committee has rejected. If the Committee should be of this opinion, the deed is void, and consequently there is no right to vote.

But further, supposing no ground for this objection, the deed is not good in law, as being composed of materials which are not allowed; in Co. Lit. 229. it is said, "if a writing be on a piece of wood, or upon a piece of linen, or in the bark of a tree, or on a stone, or the like, &c. and the same be sealed or delivered, yet it is no deed; for a deed must be written either in parchment or paper as before is said, for the writing upon these is least subject to alteration or corruption."—Blackstone in 2 Comm. 297. adds, "Wood or stone may be more durable, and linen less liable to rasures, but writing on paper or parchment unites in itself more perfectly than any other way, both those desirable qualities (S.);"

Now, if the reason for rejecting the materials before enumerated, is, that they are *liable to alteration or corruption*, by the same authority, that instrument cannot be re-

ceived for a deed, which is composed of a substance that a bit of bread or a finger can efface, without the risk of discovery : even the ordinary changes from hand to hand would in a short time obliterate it. Lord Coke himself says, that where he uses the (*&c.*), *other things of the like sort* are intended to be described; * and it cannot be doubted that if, when writing the passage above cited, he had been asked, whether any such material as pencil might be used for the writing of a deed, he would have classed it with the other subjects which he has enumerated. The consequences of giving a sanction to this mode of trifling with the securities of property, may be very dangerous to civil rights.

A further objection arises out of this deed in the description of the burgage ; it contains nothing by which the grantee can distinguish his own burgage from any other in the borough ; if he were to take possession of the first he came to, he might defend himself in that as well as in any other by this deed ; it gives no description, no boundaries, no tenant, by which it may be

* See Co. Lit. 10. a. 17. b.

identi-

identified; it says no more than '*All that burgage in Downton.*' This was an objection strenuously urged against the White-horse voters *, and ought to have equal weight here.

Formerly, when deeds were compleated by livery and corporeal possession, less minuteness of description was sufficient, and perhaps if a deed in these words had been so compleated, it might stand; but it should be remembered, that in the present form of conveyance, the possession is only nominal, and the grantee is not only not in possession of his burgage, but may never have seen the place where it lies; he can know his burgage only by the description his deed gives him †.

The utmost that can be said of such a deed is, that it is good against the grantor himself; but the present question is between *third persons*, and there is no distinction in the law better known than this, that acts which bind him from whom they proceed, may be void as to others; which is derived from the principle, that no man

* See p. 183. † See on this subject Note (N).

shall take advantage of his own wrong; but if there be any legal defect in this grant, any other burgage-tenant of Downton may take advantage of it upon this occasion, because it tends to diminish his own franchise.

The counsel for the fitting members answered these objections in the following manner.

The whole of the first objection is founded on a presumption, drawn from facts which more fairly warrant a contrary presumption; for if such additions to the deed had really been made after its execution, they would have been made more regularly—the writer would not have been foolish enough to render it so obvious to suspicion. Although the evidence by which the doubt might have been cleared up, was adjudged incompetent, yet the fact may be naturally accounted for from what has been proved; by supposing, that the distance of Edsal's residence and the early period of the election, did not allow time enough for much intercourse with him,

him*, and therefore the deeds might have been sent to him in this state, in order to allow of his altering them if he should see occasion. *The name*, mentioned by Edsal to the witness, is more probably that which still remains in blank, of the *tenant*, than that of the grantee; for many *names* must have been wanting, if the whole had been in blank; nor could he have said, *all was filled up but the name*, if no names at all had been filled up: This, and the present state of the deed furnish a strong argument of the innocence of the transaction. The witness's want of observation is no more than frequently happens to attesting witnesses, who are supposed to attend only to the sealing and delivery, and to know nothing of the contents of the deed; nor is it necessary that they should †.

But

* The late Parliament was dissolved on the 25th of March, and the election took place on the 5th of April.

† As an authority for this position, the counsel cited the case of Peat and Ougly, in Com. Rep. 197. which arose upon Lord Bolingbroke's will made before the statute of frauds. But the doctrine of that case does not go so far as this point; there, it is true, the testator *said* nothing to the witnesses, of the name or quality of the instrument they were attesting; but he had writ with
his

But even admitting that the words in pencil were inserted *after* the execution, if with the consent of the grantor, the deed is equally good: In the case of Tecseira * and Evans, in an action upon a bond, tried before Lord Mansfield, at the sittings at Guildhall, after Trinity Term 1774, the bond had been executed in blank, and the plaintiff had advanced money on it to a broker, after which the names and sums had been inserted in the blanks by the broker; the defendant pleaded *Non est factum*, and Lord Mansfield was of opinion that the bond was well executed, and that the broker was to be considered as the attorney authorized by the defendant to fill up the blanks; whereupon the plaintiff had a verdict. It may be said that this case is not in point to the present, because arising between the obligor and obligee; but if a deed so executed will pass an interest, it is his own hand, at the place of attestation, the words, *Signed, sealed and published as my last will and testament*. According to 3 Burr. p. 1775, Lord Mansfield in the case of *Bond and Seawell*, says, "It is not necessary that a testator should declare the instrument executed, *to be his will*;—or that the witnesses should know the contents."

* Cited by Mr. Wilson from memory.

sufficient

sufficient for the present argument: If Edsal's freehold passed to Webb, he acquired, as incident to it, the right of voting; that it did pass to him is evident, because the grantor could not turn him out, and if he could not, no other person could.

The only authority for the second objection is, the explanation of an (&c) of Lord Coke; but the subjects he mentions are of materials to receive the writing, not of the writing itself: Why is not pencil as good as ink if it is as legible? any writing, expressing the intent of the parties, is sufficient to bind them in any matter of contract. The transactions of the present age are very differently conducted from those of the age in which Lord Coke lived; if it had been the practice of his time to have transferred a number of freeholds for an election day, or for the use of a few hours only, he would have said, that a grant in pencil would have lasted long enough for the purpose.

As to the last objection, the uncertainty of the description in the deed, is supplied by the evidence produced, as by law it may

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be.

be. *Id certum est quod certum reddi potest*; a grant of "All that burgage in Downton," means "All my burgage," and if the grantor has but one, as is the case here, that one passes by this grant.

The committee were of opinion—That the vote was good.

10, 11, 12. Hon. Edward Bouverie, William Lucas and James Selfe;—These three voted for burgages, the property of the Earl of Shaftesbury, who had enfeoffed Mr. Ewer of them by a deed of feoffment, dated in 1782; on which livery of seisin was indorsed, dated 22 Dec. 1783: The names of the attornies impowered by the deed to deliver seisin, were written on an erasure. This deed Lord Shaftesbury executed in Italy, and two subscribing witnesses attested it; as they were not at this time in England their hand-writings were sworn to before the Committee.

Mr. Ewer had transferred these burgages to the voters by deeds dated Dec. 23, 1783; in that to Mr. Bouverie—the date was writ-

written on an erasure; the other two, which had been executed together with the first, were re-executed on the third of April on the same paper and stamps, *on account of an alteration in the christian, or sir-names, or both, of the voters*; (which was the account the witness gave of them.) The general objection to these three was, that the deed from Lord Shaftesbury had an apparent defect in it by the erasure in the power of attorney; and the counsel contended,

That they had a right to presume, that the attornies' names had been inserted after the execution, unless the counsel on the other side should shew the contrary by evidence; the absence of the witnesses confirmed this presumption; That the law regarded some deeds with so much nicety, that it required an attestation to every erasure in them; and in those in which this nicety was not absolutely required, the neglecting it was always suspicious. In the passage before cited from Lord Coke, it appeared that the law paid no regard to deeds written on materials *subject to alteration*; here, there is in fact an alteration visible; and therefore by

the same rule, it ought to be rejected from the deed. They said, they had not been able to find any case in the reports on this subject, but that this doctrine is sensibly laid down in Erskine's Institute of the Law of Scotland, p. 433. sect. 20. in which may be seen, in what manner that law enforces the general principles of good sense, which are supposed to have equal place in our own*. The author, after treating of the solemnities of deeds, says, "From the observance of the solemnities above explained, a presumptive evidence arises for

* Blackstone, 2 Comm. 308. (fifth edit.) says, "A deed may be avoided—by rasure, interlining, or other alteration in any material part, unless a memorandum be made thereof at the time of the execution and attestation." He takes this from 11 Rep. 27. a. which he cites: That was an action against an *obligor*, who pleaded *non est factum*. In 5 Rep. 23. it is held that an erasure in the date after delivery, vitiates a deed; that was likewise a question between *obligor* and *obligee* upon the same plea. In the same manner, Rolle in his Abridgment tit. *Faits*, in describing the circumstances by which deeds are avoided, puts those cases only which have happened between *grantor* and *grantee*. But in the case before the Committee, arising between *third persons*, the grantor might be supposed indifferent to the objection.

the genuineness of a deed, without which it has no legal force. Where therefore a deed is vitiated by erasing certain words, and superinducing others in their place, or by interlineations, such additions or interlineations cannot bind the granter, because they are destitute of that evidence; the presumption is, that they have been made after the granter and witnesses had signed the deed, since no person is presumed to sign a blotted or vitiated writing. But if it be either mentioned in the deed itself, or acknowledged by the granter on oath *, that those alterations were made before his subscription, they are obligatory on the granter. In some special cases, the instrumentary witnesses are admitted to prove this fact—but more frequently that manner of proof is rejected.” (Z.)

The counsel for the sitting members answered this by saying, That in such deeds as those in question, the law did not

* It may be observed, that in this passage the author has in view those cases, in which the granter is supposed to *deny* the effect of his deed, under the circumstances mentioned.

require writings on erasures to be attested particularly; therefore the rule by which the courts required this nicety in some of their records and affidavits, could not with any propriety be brought into the present argument; That if the appearance of the deed created any suspicion, it would be unjust to extend it to the prejudice of the present parties, who had no concern whatsoever in the making it; and as it was impossible for them to compel the appearance of the attesting witnesses who were beyond sea, it would be equally unjust to *presume* any thing against them on account of such absence, since they could not prevent it.

That the law of Scotland was much more exact in the execution of deeds than the law of England, and the citation from Erskine, was to be imputed to the peculiar regulations of that law.

The Committee resolved — To admit these three votes.

Besides the above objection, there was a particular one to Lucas and Selfe, That
their

their deeds having been compleated by their first execution, could not be changed by a re-execution, without *new stamps*; but this objection was not insisted upon afterwards, it being proved that the grantees under both executions were the *same persons*, and that their names had been at first mistaken.

There was also a particular objection to Mr. Bouverie, that the day of the date being on an erasure in the deed, it was reasonable to suspect, that the deed was not executed on the day of that date, unless they should clear up the doubt by satisfactory evidence; that it must have been executed by Mr. Ewer the feoffee, before the livery of seisin to him, and altered afterwards, in order to be consistent with that seisin, without which the feoffee could make no title; that it could have no other meaning than this, because it was long enough before the election.

This objection seemed to have been abandoned, after the counsel for the sitting members had produced evidence to shew, that seisin had been delivered on the morn-

ing of the 22d of December, and that Mr. Ewer had executed the deeds in the evening of the 22d or 23d.

13. Thomas Goddard—His vote was objected to for a defect like that against Lucas and Selfe, but this objection was done away by similar evidence to theirs; another still remained, viz. That it could not be proved to be an antient burgage by the quit-rent roll.

The counsel for the sitting members answered this, by producing evidence to shew, That Lord Feversham purchased 13 burgage tenements of Ashe—that for these, the sitting members had made only 12 votes—that 11 of them had been already applied to 11 entries in the quit-rent roll of Ashe's burgages—that this burgage was one of those derived from Ashe, and consequently must be one of the remaining two, but they could not ascertain which.

One of the entries referred to in the roll was thus:

“For that late Davis's——1 s.”

The other,

“For that bought of W. Snelgar and Mowlands——8d.”

An

An aged witness did not remember any one of the name of Davis in these tenements; but another witness resident in Downton swore, that he had heard that Goddard's tenement was that named *Davis's* on the roll.

Upon this the counsel contended, that they had produced sufficient evidence to establish the only fact wanting, viz. that the burgage paid a quit-rent; for that it could hardly be doubted now that the voter had a burgage.

The counsel for the petitioners argued,

That as both parties had all along proceeded upon an admission of the necessity of proving the payment of an *antient, certain*, quit-rent, in order to complete a burgage title, the voter's could not be considered as such, because the utmost that even the counsel could say of it was, that the burgage must have paid one of two rents; i. e. either a *shilling* or *eight pence*. According to this rule, if there were any other entry on the quit-rent roll unapplied, they might with equal certainty make use of it; That they had therefore failed in
this

this essential quality of the burgage, and consequently it ought to be rejected.

The Committee resolved—To admit the vote.

14, 15. Wm. Scott, John Goodfellow.

Their names in the conveyances were written on erasures. These deeds had been executed to other persons, and the execution properly attested; but it being discovered that these persons lay under some disqualification in regard to voting, their names were erased from the deeds, and the above inserted in their stead; after which the deeds were re-executed in the presence of the same witness, under the *same stamp*. The two persons whose names were first used were not present at the execution of the deeds, nor was any evidence offered to shew, that they were acquainted with the transaction.

The consideration of these votes came on before the Committee on the 6th of July, at which time, the counsel for the petitioners called for their deeds, and they were delivered in to the clerk of the Committee. It is the usual method for the

clerk to return to the parties for their convenience, if they desire it, such instruments or papers as are given in evidence to the Committee, after his having made a private mark on them as a memorandum of their having been produced in evidence; the above deeds were in this manner returned to the agent for the sitting members, after the counsel for the petitioners had read them. On the 12th of July, on which day the counsel for the sitting members concluded their case, these deeds were produced again to the Committee, with a new stamp, which had been affixed to them in the interval since the 6th instant, upon payment of the Stamp-office penalty.

Upon these facts the counsel for the petitioners objected,

That the voters had no right at the time of the election, to the burgage for which they voted; that the persons in whose names the deeds were first sealed and delivered, became thereby intitled to them, and were alone capable of transferring them to others; That by the several Stamp-Acts, the conveyances to the voters were void,

as

as being written upon *old stamps*; and particularly by 12 Geo. III. ch. 48. no right whatever could be acquired under them: That the deeds having been produced in evidence to the Committee, the subsequent stamping was null and void.

The several Stamp Acts particularly referred to were

9 & 10 Will. III. ch. 25. sect. 58, 59.
1 Anne, stat. 2. ch. 22. f. 2, 3. 12 Anne,
stat. 2. ch. 9. f. 25. 12 Geo. I. ch. 33.
f. 8. 30 Geo. II. ch. 19. (T).

In support of these votes the counsel for the sitting members argued to this effect:

Though in general the sealing and delivery of a deed is understood to be *to the use of the grantee* therein named, yet that is because of a supposed privity between the parties, arising from a known mutual advantage; but that in *voluntary* deeds, as those in question were, * the same privity does not hold, and the grant is not effectual, without the acceptance of the grantee; here the latter knew nothing either of the intention, or of the grant to him, (as far as

* *Qu.*—See the sense in which this epithet is used in 1 Atk. 625. and 3 Atk. 412.

appears) and the grantor never delivered it to his use, or out of his own possession. A voluntary deed may be cancelled at any time by the party making it, and when cancelled, becomes a nullity. This rule was enforced in a case in Chancery before Lord Northington *, where a husband had made a voluntary settlement on his wife and children, and afterwards agreed to sell the estate settled; one Stell purchased it, with notice of the settlement, and confessedly in order to defeat it; upon a bill filed by the wife, the chancellor directed an issue to try, *Whether a valuable consideration had been given for it*; the jury found it to have been so, but *after notice* of the settlement; yet hereupon Stell's purchase was established by the chancellor.

If the persons first named in the deeds were to bring ejectments for these estates, they could neither prove possession, nor delivery of the deeds to their use, nor a valuable consideration paid, nor any privity between them and the granter, and consequently could not recover.

* Cited by Mr. Wilson from memory.

The practice in this and other boroughs of the same kind, is well known to be, to make such grants merely for the purpose of voting, for which purpose the deeds are seldom delivered to the voters till going to the election; and till then both parties consider them as *Escrows*; after the poll, the deeds are delivered back to him who gave them, and no more thought of, though no doubt the voter might keep them if he pleased. The intent of the parties is a very material consideration here, because in such case the courts of equity would not decree possession to be given to the grantee (U).

Hence it appears, that the first execution of these deeds had no effect, as between the parties; if so, they were not deeds, which, according to the Stamp Acts, required a stamp; that only became requisite when the deeds became effectual, which was upon the *second* execution and delivery, for till then nothing passed from the granter. The erasures made a re-execution necessary, but new stamps could only be necessary to a *new grant*; whereas there
is

is in this case substantially but *one* grant. But supposing this to be otherwise, these deeds having been stamped anew, are now become effectual, because thereby they have relation back to the time of delivery.

By the Stamp Acts it is lawful to make deeds without stamps; as *deeds* merely, they are good in that shape; the provision of these laws is, that they shall not be *given in evidence* in courts of law or equity, unless stamped: By all of them, stamping subsequent to the execution of deeds, is allowed, upon paying certain sums prescribed to the Stamp-office. In Westminster-hall, if an action were brought upon a bond, and the record entered in court, before it should be discovered that the bond was not properly stamped, if it should receive a stamp *then*, it would be effectual for the purpose of the cause; even if it were stamped while the cause is trying, it would be sufficient; and cases have happened in which judges have directed that to be done, in order to support the evidence of a deed. The only difference between the subsequent stamping and the original, consists
in

in the penalty required to be paid to the Stamp-office for the omission (V.)

If therefore the deeds are rendered effectual by the subsequent stamping, (which cannot be denied) the time of doing it must be immaterial; even though done during the sitting of the Committee. It is enough that this happens before the court determines upon them, and this is conformable to the practice in Westminster-hall.

As to their being given in evidence, and in the *custody of the Committee*, it should be observed, that this was not done on the part of the sitting members; it was no part of their case; but the deeds being called for by the petitioners, they were then produced, and upon the objections being taken, the cause of it was removed. This was done without fraud or artifice, the deeds were in the hands of those to whom they belonged, who might do with them what they thought fit. The counsel for the petitioners, in order to be consistent on this point, should have objected to the production of the deeds with the first stamp, the objection now comes

too

too late; if they had at first opposed their being read, the deeds might then have been carried to the office to receive the new stamp, and with that affixed to them might have been produced again; this method, and that now under consideration, are in substance the same, unless it can be supposed that the Committee would have interposed their authority to prevent it, which in justice they ought not to have done. The delivery of the deeds to the Committee, was the act of the petitioners, who called for them, and therefore it would be unjust that they should have advantage of this circumstance, by contending, that from the time of their production, they are to be considered as locked up in the clerk's hands, since, if there were any restraint, it was occasioned by themselves. (W.)

The counsel for the petitioners argued thus,

It is not pretended that the voters had any other right to a burgage in Downton, than what they derived from these deeds; if these therefore are defective, their titles fail. By the execution of a deed, the con-

S

tract

tract is affirmed, for it is the *sealing and delivery* that constitutes a deed, and it is not necessary in any case that the delivery should be *to* the other party concerned; the execution in this case is proved to have been in the usual manner, and not a *conditional* delivery, which is of itself an answer to that part of the argument, on the other side, in which these deeds are said to be like *Escrows*, before delivery to the grantee. (X.)

In *Perkins*, chap. on *Deeds*, sect. 137. there is a just and proper account of an *Escrow*; "And notwithstanding a deed be sufficiently written in my name, and sealed by me, and is not delivered by me or by another by my assent, or by my agreement or commandment; the same shall not bind me for all this, while it is but an escrowl; and if I make such escrowl, and let it lie by me, and a stranger gets it, it shall not bind me, for it is not yet my deed." Here an escrow is plainly contra-distinguished from a deed (X.) Actual acceptance is never necessary to effectuate a deed, it is always presumed; even trover may be brought for it without proving acceptance. In equity,
if

if a man should be made a trustee in a deed, without his knowledge or participation, he may be compelled to convey according to the trust : perhaps in the course of business, more deeds are executed in the absence of those to whom they are made, than in their presence.

With as little reason can it be contended, that these deeds can be called *voluntary*, in the legal sense of that word ; they proceed upon valuable consideration, viz. a high rack-rent to be paid by the grantee *, and he might bring trover for his conveyance. In the Downton case, in 1775, this point was strenuously contended for †, and also that the deeds empowered the voters to take immediate possession ; an argument which was then urged as beneficial to both the parties now in contest. The case cited before the Chancellor would not affect the present, even if these were to be considered as voluntary conveyances ; for that case depended entirely upon the Stat. 27 Eliz. ch.

* This was the form of all the deeds I looked at ; the sums of the rent in them were various.

† 1 Doug. Elect. 223. See Note (U.)

4. f. 5. There is another to the same purpose in 1 P. Williams, 577. and 1 Atk. 625. The fifth section of that statute enacts, that a voluntary deed shall be void against purchasers for valuable consideration, and makes no mention of its being done with, or without *notice*; the inquiry therefore in cases arising under that statute, is merely of the *consideration paid*, according to the Chancellor's direction. Now, notwithstanding the mention of rack-rent in these deeds, it will not be pretended that the voters have paid a valuable consideration for their burgages.

The practice in burgage tenures cannot affect the course of law, how general soever it may be; in the present instance it is founded on a perversion of legal principles. But it is not usual in this borough, as has been asserted, for the voters to return the deeds after the closing of the poll, to him from whom they received them, without any thing more; if it were so, most of the votes in this election would be bad. The usage is for the voter to re-convey either to the grantor or some other, or if he votes a second time for the same burgage, he does

it by virtue of his first deed ; the whole of this cause has been conducted upon a tacit admission of this principle ; a particular instance of it is in the vote of Barnes *, to whom it was objected that another voted for his burgage in 1774, and that the present voter must therefore derive a title from that person ; the counsel on the other side, in answer to the objection, immediately produced conveyances to this purpose †.

The letter and spirit of the stamp acts are misrepresented, when it is argued from them, that they only relate to the giving deeds in evidence ; the words of 12 Ann. c. 9. s. 25. are “ shall not be *available in law or equity till*, &c.” Unless they are stamped therefore they operate nothing ; and it is immaterial whether the voters have a freehold burgage *now* or not : The argument is, that the deeds could not give it them at the election ; First, because it was before conveyed to another, and Secondly, because the deeds were not properly stamp-

* See p. 230.

† I find by the minutes of the Downton Committee, in March 1781, that thirteen of the derivative voters for Mr. Shafto, voted for the same burgages in the elections of 1779 and 1780.

ed. The attempt to cure this defect has exposed it more fully; for the effect of these deeds now, is not, that they may be lawful evidence in this court, but to give a freehold *at the time of the election*; the method taken for this purpose, is such as the Committee are bound to discountenance, as it is a fraud upon their proceedings; the deeds being supposed to be in their custody from the time they were first produced, ought therefore to be considered now as when first produced: It was impossible that the objection to them could have been taken sooner than it was, because upon the face of the deeds there was nothing defective, but an erasure; and it was by the cross-examination of the subscribing witness, that those facts were discovered which led to the objection.

Besides the foregoing arguments, the stat. 12 Geo. III. ch. 48. furnishes one that is conclusive, upon another ground, That statute, which was made for preventing frauds in the stamp duties, enacts, "That after 1 August, 1772, it shall be *felony* to write any matter whatsoever in
respect

respect whereof any stamp duty is payable, on any paper, &c. whereon there shall have been before written any matter for which a stamp duty was payable, before such paper, &c. shall have been again stamped according to the acts; or fraudulently to erase or scrape out any thing written on such stamped paper—," It should be observed, that the second provision alone takes in a *fraudulent intent*, for the first inflicts the punishment upon any commission of the fact, whatever the intent may be.— Now the evidence upon these deeds proves a fact directly within the provision of this law, i. e. that a felony has been committed in making them; if the Committee should be of this opinion, they certainly will not effectuate any transaction that is founded in a felonious act; no civil right can by law be acquired under it, and therefore these deeds cannot possibly convey a title to the voters, being thereby rendered null and void.

The Committee resolved — That these votes were bad. (Y.)

The several decisions of the Committee had brought the numbers for the candidates to the following state :

For Shafto	41
Conway	40
Bouverie	40
Scott	39

In consequence whereof they determined,

That Mr. Shafto was duly elected.

That with regard to Mr. Conway, the election was void, and the same with regard to Mr. Bouverie.

That Dr. Scott was not duly elected.

At the same time (the last day of their meeting) they came to the following particular resolution :

“ That John Dagge gentleman, is the legal returning officer for the borough of Downton, in the county of Wilts. (A.A.) *”

All the above resolutions were reported to the House by the Chairman, on the

* See p. 145.

19th of July*; the cause having lasted a month.

Several questions of evidence arose in the course of this cause, which occasioned arguments by the counsel, and decisions upon them by the Committee; These and some other matters I have reserved for this place, that they might not interrupt the regular narrative of the cause.

Upon the question relating to the returning officer, on the part of the sitting members the counsel offered to produce from the proper office, the return made by Mawson the borough steward in 1732, to certain commissioners *appointed by letters patent, to take a survey of the officers of courts of justice and their fees*; in which return the steward states among other things, "That the *steward* has the return of writs to Parliament."

The counsel for the petitioners contended, that this evidence was inadmissible;

* Votes, 19 July, p. 436.

that

that if the inquiry under which this return had been made, had related to this question, it could not be received, because the hand-writing of a deceased person could not be of more avail than his declaration if living; and he would not have been allowed, if living, to have proved any right or privilege of his own office; he is too much interested in such questions: Besides, this answer in writing was made *ex parte*, and not subject to a cross examination. But they said, the commission under which this answer was given, had no concern with the *rights* or *duties* of any officer, it related merely to their conduct in respect of *fees*, and the steward of this borough went purposely out of his way to state any part of his authority.

The counsel for the sitting members argued,

That it was admissible evidence, not as evidence of the *right*, but of an acquiescence by the bailiff of the hundred in what he now calls an usurpation; That it was admitted in the cause, that the bailiff of the hundred has not exercised this office during

ing this period; and this return shews, that when a public inquiry was made into the duties of the office, he suffered another to claim them.

After a short deliberation (without ordering the room to be cleared) the chairman informed the counsel, that the Committee had resolved not to receive the evidence.

In order to establish the deed (part of which was in pencil) under which John Webb claimed *, the counsel for the sitting members, after having examined one of the two subscribing witnesses, offered to call Edsal the grantor as a witness †. The counsel on the other side contended, that he was incompetent; that no instance occurs of such evidence being given in the courts of Westminster-hall; that he was a party in the question, and interested to support his own grant under which the voter claimed a franchise; in which, if he failed, the grant would be so much less valuable; that the voter himself, it would be admitted, could not be examined, and by

* See page 231.

† See p. 233.

the same reason, he from whom he claims ought to be rejected, because it would be in effect the same thing as calling the voter himself; that in an action on a bond, the evidence of the obligor, though against himself, is not allowed to affect third persons, in which character the present parties stood. In a case lately determined on a bankruptcy, it was necessary to prove a bond for the petitioning creditor's debt, for which purpose the confession of the obligor was offered as evidence; but the court held this evidence, standing alone, to be insufficient; yet if it had been against himself it would have been good evidence*.

But this evidence is not only inadmissible, but nugatory and useless; for if examined, he could not say more than his hand and seal already declare; to ask him whether these are valid, would be absurd.

* This was the case of *Abbott and Plumbe*, Doug. Rep. 205. The judgment there did not go so far as this last position, tho' it had been contended for by the counsel on one side; the point determined was, that "the acknowledgment of the obligor does not supersede the necessity of calling the subscribing witness."

The attesting witnesses are the proper persons to give evidence concerning deeds; it is peculiar to them—inasmuch, that if they die, the inquiry is not made into the hand-writing of the parties, but that of the witnesses; this point was determined by the judges of the Common Pleas in the last Term (B.B.); and the reason given for it was, because the fact to be proved by an attesting witness, is, *that he saw the party execute*, and if he cannot be found, his hand-writing is allowed to be evidence of this fact.

Here are besides, two witnesses who attest the deed in question, of whom only one is called; and it is a rule, that none can be examined as to the execution of deeds before the subscribing witnesses: Therefore, unless this is complied with, it is alone a sufficient objection to this witness's being called now.

The counsel for the fitting members argued,

That the witness did not fall within any of those descriptions by which the law rejects evidence, either from interest, want
of

of capacity, or infamy ; as to interest, he was in point of law interested on the other side, to deny his grant ; that as he was now called to confirm his own contract, which the law supposes men are interested to deny, his evidence must be unexceptionable, for thereby he supports a right against himself, viz. a grant of his freehold to another for two lives ; They denied that he was a party in this question, or even affected by it in law, for whether Webb had, or had not, the right of voting for his freehold, it would not alter the contract for it between him and Edsal ; how valuable soever the franchise annexed to it might be to the voter, that makes no part of the consideration in this deed : In this consists the difference between the evidence of the voter himself and that of Edsal ; the former is directly interested to support his own right of voting, the latter is unconcerned in this incidental right. As to the rareness of such evidence in other courts of justice, it is owing to the nature of the questions that arise in them ; in which the maker of a deed is generally a *party* either
directly

directly or indirectly in all actions concerning it, and the deed itself is denied in the pleadings *; but in any questions that arise collaterally upon deeds, if a man admits his own deed, such admission is received even to conclude others. If an ejectment were brought by Webb, founding his title on this deed, can there be a doubt that Edsal's admission of it would enable him to recover in the action? It is not necessary that an attesting witness should subscribe his name to the deed †, except in the case of a will (where the statute requires it); however it is usual to do it, and then it appears upon the face of the deed to be the best evidence of its execution; and this is the reason why no other witnesses are called before those whose names are subscribed; but this rule does not extend to the case of the grantor himself, when he comes to acknowledge in person the fact to which the others bear witness of him,—an evidence that renders

* See Note in p. 244.

† In 4 Doug. Elect. 74. a witness who had been present at the execution of a deed produced, but was not a subscribing witness to it, was allowed to put his name to it during his examination, and then to prove it.

theirs

theirs unnecessary; in all cases other witnesses may be called to confirm the subscribing witnesses; and in the case of Mr. Jolliffe's will, in which there was cause to suspect their veracity, others were allowed to be called even to contradict them, and the will in that case was established upon such testimony, though the subscribing witnesses denied their attestations. (C.C.)

In all questions of evidence, the true way to decide, is by inquiring what is the *end* of the proof, for evidence that is good to one purpose, may not be so to another; here, the subscribing witness not being able to clear a doubt, arising on the face of the deed, it becomes necessary to examine further; who then can be more proper for this purpose than the maker of the deed, where he is not interested in the question, as it is before shewn that Edsal is not?

When the arguments were ended the court was cleared, and the Committee deliberated, after which the counsel were called in and informed,

That the Committee had determined—
Not to admit Mr. Edsal as a witness.

The

The counsel for the sitting members likewise called the Earl of Radnor, for the purpose of establishing Edsal's deed *. His evidence was objected to on account of interest : It was said, that the part he had taken in the election, by directly making the titles to so many voters, and by attending the cause throughout †, shewed that he considered himself as a party ; but the Committee thinking this no legal objection, he was sworn. Upon being asked whether he paid the expences of the petition, he answered in the affirmative : The counsel for the petitioners now contended, that there was a legal objection to his lordship's evidence ; that in common law trials, if a witness has undertaken to pay the costs, it is an allowed objection to him.

The counsel for the sitting members answered,

That in order to disqualify his evidence, the interest must be such as is to be affected by the event, i. e. that in one case he may

* See p. 233.

† His lordship generally sat at the bar-table in the Committee-room. See the note in p. 155.

gain, in the other lose ; that for this reason it was a good objection in common law trials, because the costs of the suit are paid by the loser, and saved by the winner ; but before Committees, each party pays his own costs ; and be the event what it may, the expence is the same to them : Here is therefore nothing in the event to bias the judgment ; the criterion of competency in a witness, is a direct interest, influencing all men alike upon general principles ; but the rule to which this case has been applied is partial, and confined to a particular judicature.

The counsel for the petitioners replied,

That the principle of their objection was a general one, for that no man who voluntarily pays all the expences of a suit can be supposed to have a mind unbiassed and impartial to the side he espouses ; That there was much more resemblance between trials before Committees, and those in the law courts, than the counsel on the other side allowed, for it was in the power of Committees to award costs to be paid in certain

certain cases of frivolous petitions*; and though this particular cause might exclude the probability of its concluding with a resolution to that effect, yet the possibility of it was ground enough to argue, that the rule of other courts would hold in this.

When the counsel had ended, his lordship was asked by one of the Committee, "Whether in the event of a new election, arising out of the present petitions, as, if by reducing the numbers to an equality, the Committee should determine the last election to be void, he should pay the expences of such new election?"

His lordship answered in the affirmative. The Committee ordered the room to be cleared, and after deliberating, directed the counsel to be called in, when the chairman informed them,

That they were of opinion, that Lord Radnor was not a competent witness (DD).

* See several cases in which this rule has been enforced, in 1 Doug. Elect. 165. But it seems questionable, whether it could take place upon a *double return*, whereon both parties have petitioned.

At the same time, the Committee asked if the parties had any objection to their striking out of their minutes, all the questions to Lord Radnor, together with his answers to them *? To this no answer was made by either party, but the Committee afterwards passed a resolution for this purpose at the end of the day, when the counsel had withdrawn.

When the vote of Moses Wiltshire was under consideration, Mr. Blake was called to prove the infancy of Lady Radnor and Mrs. Bowater; he was objected to as being a voter still possessed of his burgage, and was not examined, though the counsel on the other side said it was no objection upon this question †. The fact was afterwards admitted.

During the litigation of Mr. Blake's vote, the counsel for the sitting members in support of it, offered to give in evidence a copy of the poll for the Downton

* There were many more than I have mentioned above in p. 273. but as they did not affect the legal state of the question, I have omitted them.

† He was examined in the former part of the cause relating to the returning officer. See p. 122.

election Aug. 21, 1727, whereby it would appear, that the owner of Mr. Blake's bur-
gage had then voted for it; this paper was
found among the deeds and papers of Lord
Feversham's estate, and was intituled, "A
true Copy of the Poll, &c."

The counsel for the petitioners contend-
ed, That it could not be received in evi-
dence; that it was not properly authenti-
cated even as a copy, no hand-writing to it
being proved, nor any authority annexed to
it: By 7 & 8 Will. III. ch. 25. s. 6. copies
of polls are directed to be given to those
who apply for them, which cannot be
done unless originals are preserved; but it
does not appear that this copy was made
by authority, as the act directs; and even
if this were such copy, it could not be read
in evidence, being *a copy*, till the original
should be properly accounted for.

The counsel for the sitting members
contended, that this paper of so antient a
date coming from a family repository of
deeds, possessed equal authority with title
deeds; that the subject matter of this paper
made it an exception to the rule with re-

spect to copies, because *the poll* is the numbering of the voters, and every writing of it may be called a copy; that the act of Will. III. orders the mode of proceeding in county elections, but in boroughs they are not bound to preserve the polls they take, *in writing* (EE.); the question therefore for the Committee would be, whether they would not receive in evidence this account of the election, of which perhaps a better never existed,

The Committee without clearing the room, resolved not to admit the evidence.

Upon the first question in the cause relating to the returning officer, the counsel for the petitioners called Mr. Harrison to prove the Bishop's signature to the approbation of Mr. Serle's deputation to him; his evidence was objected to as incompetent on account of interest; the point was argued, but produced no decision from the Committee, as the counsel for the sitting members afterwards dropped their objection, and he was sworn; I have therefore thought it unnecessary to state the arguments. The counsel for the petitioners
relied

relied on the case of the King and Bray in Rep. Temp. Hardw. 358. and Buller's Nisi Prius, 286. edit. 1772. (which seems to be the same case with the King and *Robins*, 2 Stra. 1069.) The point of this case is, that a corporator having exercised a corporate authority, is a competent witness after the expiration of it, to prove a custom relating thereto *.

When the counsel for the sitting members had concluded the opening of their case, they were asked from the Committee, if they intended to set up three votes which appeared by the poll to have been tendered for them, and rejected by the returning officer. Mr. Wilson answered, that if it should be necessary, they might afterwards contend for them; upon which Mr. Serj. Adair said, that when that should be contended for, he meant to oppose it on this ground, *that the petition of Bouverie and Scott contained no allegation, that Mr. Dagge had rejected any of their votes* †, and

* See it in the case of Bedfordshire.

† See the petition, p. 110. upon this subject; see likewise Doug. Elect. 4 vol. 144, 147. 3 vol. 15, 16, and 255.

therefore they were not intitled to enter upon any such case. Nothing more was said on the subject, and these votes were never afterwards mentioned.

On the 9th of July, at which time the counsel for the sitting members were going through evidence in support of their votes, they informed the Committee, that an aged witness on their part was then lying dangerously ill, and asked the favour of them to adjourn, for the purpose of asking leave of the House to adjourn the Committee to the witness's lodgings in order to take his evidence, (which they said was very material to them) or to adjourn at once to the witness's lodgings; if the counsel on the other side would consent to that method; the latter upon being asked, refused their consent; and the Stat. vi. Geo. III. c. 16. f. 13. (* Mr. Grenville's Act) being read, the Committee intimated an opinion that

* " — the House shall order the said select Committee to meet at a certain time, &c.—and *the place of their meeting and sitting shall be some convenient room or place adjacent to the court of requests, properly prepared for that purpose.*"

such

such adjournment would be illegal, by the positive directions of the statute: Hereupon the counsel for the sitting members proposed that the Committee might delegate their clerk to take the witness's deposition in the presence of persons authorised by both parties, and urged the Committee to exert that inherent power, which, they said, must necessarily reside in every independent court of justice, of regulating their own modes of proceeding in such cases of necessity, upon which the law from whence they derived their institution was silent.—One of the Committee observed, that they could not commit a power to their clerk to take a deposition, and here the matter dropped.

On the same day (being friday) the counsel for the sitting members having closed the evidence on their case, the Committee adjourned in order to ask leave of the House to adjourn till monday, having several questions of importance, and a great deal of evidence to consider; the chairman accordingly, by the direction of the Committee, moved the House for leave, which being granted, the Committee met again within

within half an hour and adjourned to
monday July 12*.

At the conclusion of the cause, the
counsel for the petitioning electors prayed
the Committee to pass a censure on the
conduct of the returning officer, for reject-
ing the votes of his clients, which, he said,
the decisions of the Committee already
shewed to have been done without any
reasonable cause, and betrayed excessive
partiality and injustice.

* By sect. 19. of the statute above-mentioned, the
Committee cannot adjourn for longer time than twenty-
four hours (except Sundays and Christmas day) "with-
out leave first obtained from the House upon motion,
and special cause assigned." See Votes, July 9. p. 387.

NOTES

N O T E S

ON THE CASE OF

D O W N T O N.

PAGE 113. (A). Mr. Shafto's petition (stated in vol. 37, of the Journals, p. 521.) complained "that H. Dench, the returning officer, behaved very partially and unfairly in the execution of his office, in as much as, though he admitted on his poll the names of those who voted for the petitioner, yet, contrary to the duty of his office he put *queries* on the greatest part of the votes he so received, and at the end of the poll arbitrarily and illegally rejected them," and unlawfully returned Mr. Bouverie.

When the cause came on before the Committee (16 Feb. 1780.) Mr. Shafto's counsel confined themselves in the opening of their case, to the charge against the returning officer, in order to obtain from the Committee a decision in their favour upon the matter of the *return*; previous to their entering upon the *merits of the election*; and they particularly cited the cases of Cumberland in 1768, (32 Journ. 89, &c.) and of Shoreham in 1770, (33 Journ. 69, 70.) in the former of which, the House, in the latter, the select Committee, had adopted that course of proceeding in cases similar to the present. But the Committee came to a resolution directing

recting the parties to proceed to the merits of the election; upon which they afterwards determined generally in favour of the petitioner, without adding any particular resolution upon the return.

At the election there were for Shafto thirty-one votes, and for Bouverie eight, and the returning officer had first *queried* and then rejected, twenty-eight of Mr. Shafto's votes claiming under leases from Mr. Duncombe's trustees.

P. 118, 123, 124. (B. 1. 2. 3. 4. 5. 6. 7.)

(B. 1.) The following is a copy of the Bishop's patent appointing Duthy and Serle to the office of bailiff.

“ To all Christian people to whom these presents shall come, John, by divine permission, Bishop of Winchester, greeting, Know ye, that We the Bishop aforesaid, for divers good causes and considerations, us thereunto specially moving, Have given and granted, and by these presents do give, grant, and confirm to John Duthy, Esq; and James Serle, gent. of the city of Winchester, in the county of Hants, the office of bailiff of the bailiwick of our lordship of Downton, in the county of Wilts, and of all and singular manors, burghs and members of the said bailiwick or lordship of Downton aforesaid: Moreover, We give and grant by these presents, for us and our successors, to the said John Duthy and James Serle, the office of Receiver or Collector of the rents of our whole manor or lordship of Downton aforesaid, with the appurtenances, in the county of Wilts aforesaid, with all and singular profits, advantages, commodities and emoluments to the said office in any wise belonging or appertaining, with power and authority from us to prosecute, ask and vindicate
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in all places and courts whatsoever, and in any manner whatsoever, the rights and franchises of the lordship or bailwick of Downton aforesaid, with its members, however belonging or appertaining, and to exercise and expedite all and singular other our rights which to the aforesaid office of bailiff have usually belonged: And We do constitute, ordain and make them the said J. Duthy and James Serle, bailiffs of our bailwick aforesaid, and our receivers or collectors of the manor or lordship aforesaid, and of the rights thereof, to have, hold, occupy and enjoy the offices aforesaid, and other the premises, to the said J. Duthy and James Searle, by themselves or by their sufficient deputy or deputies, to be approved by us or our successors, for and during the term of the natural lives of the said J. Duthy and James Serle, and the life of the longest liver of them, together with all fees, profits, advantages, commodities, emoluments and liberties whatsoever, to the said offices of bailiff of the said bailwick and receiver, or collector aforesaid, in any wise belonging or appertaining, in as ample manner and form as James Field and Thomas Field, or lately Thomas Froome, or Thomas Froome Clerk his son, or any or either of them, or any other the said officers, or either of them exercised, had occupied or enjoyed the same. We will also that the said J. Duthy and James Serle, and their deputies do annually render and make, at due times, a true account of their receipts of the rents aforesaid, by them and their deputies received before the auditors in our Exchequer of Wolvesey, receiving annually from us and our successors, for the exercise and occupation of the said offices of bailiff and receiver or collector, 10 l. of lawful money of Great-Britain; to wit, for the
said

said office of bailiff, 6l. 13s. 4d. and for the said office of receiver or collector, 3l. 6s. 8d. which are the ancient fees and annuities annually paid for the said offices, to be paid annually at two usual terms of the year, to wit, at the feast of St. Michael the archangel and the annunciation of the blessed Virgin Mary, by equal portions, and by their own hands, and by the hands of each of them longest living, out of the rents and profits of the manor or lordship, lands and tenements, and other profits of the said manor or lordship of Downton aforesaid, annually to be retained: And moreover, We will for us and our successors, that if the aforesaid fee of 10l. for the execution of the offices aforesaid shall, at any time be in arrear, and not paid by the space of one month after either of the feasts aforesaid, on which the same ought to be paid as aforesaid, that then it shall be lawful to the said J. Duthy and James Serle, and the longest liver of them and their assigns, into all the manors, burghs and lordships of the whole bailiwick and hundred of Downton aforesaid, with all the appurtenances, to enter and distrain, and the distresses there so taken to lead, drive and carry away, and them to retain until the said fee of 10l. and all the arrears thereof, if any be, shall be fully satisfied and paid: Wherefore We command, as well the auditors of our accounts for the time being, that of the payment or retaining of the said 10l. for the exercise and execution of the offices aforesaid, they annually make, in the accounts for the time being, due allowance and discharge, as all and singular bailiffs, farmers, overseers and other ministers, free-tenants and leaseholders, and all inhabitants whatsoever, of and in the manor and bailiwick or lordship of Downton aforesaid, with

with its members whatsoever, that they, and every of them attend on, assist, obey, counsel and answer as is fitting to the said J. Duthy and James Serle, and the survivor of them or their deputy or deputies, in the execution of the offices aforesaid, and in all things which are known to belong to the said offices. In witness whereof, We have to these presents set our Episcopal Seal, dated 16 June, in the year of our Lord 1772, and in the 12th year of our translation."

On this grant, Livery of seisin of the said offices according to the grant, is indorsed.

(B. 2.) The following is a copy of Mr. Serle's deputation to Mr. Harrison.

"Know all men by these presents, that I James Serle, of the city of Winchester, in the county of Hants, bailiff by patent of the bailiwick of the lordship of Downton, in the county of Wilts, have authorised and deputed, and by these presents do authorise and depute Henry Harrison, of Staple Inn, Esq; my deputy as bailiff aforesaid, with power to appear for me as returning officer of the borough of Downton, at the ensuing election of burgesses to serve in parliament for the said borough; Giving, and by these presents granting to my said deputy, full power and authority to do all and every act and acts, thing and things whatsoever, belonging to the office of returning officer of the said borough, and that shall be requisite to be done: And I do hereby ratify and confirm all and whatsoever the said Henry Harrison shall legally do in the premises, by virtue of these presents."—In witness whereof, &c.—dated 29 March, 1784. J. S.

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The Bishop's approbation was indorsed in these words,

"I do approve of the appointment of Henry Harrison, Esq; as within mentioned.

B. WINTON."

(B. 3.) The following is a copy of the appointment of Mr. Elderton to the office of Steward.

"Know all men by these presents, That I, Sir Philip Hales, of Brymore, in the county of Somerset, Baronet, lessee of the manor and borough of Downton, in the county of Wilts, have made, ordained, constituted and appointed, and by these presents do make, ordain, constitute and appoint Joseph Elderton, of the city of New Sarum, in the said county of Wilts, gentleman, to be steward of the manor of Downton, and bailiff of the borough of Downton, To have, hold and enjoy the said office of steward and bailiff, with the rights, perquisites, fees and emoluments, thereto belonging, and to do and execute all and whatsoever doth and may appertain and belong to the said offices, or either of them, as fully and effectually, to all intents and purposes, as any of his predecessors in the said offices held and enjoyed the same; Giving and granting unto the said Joseph Elderton, full and ample powers to execute the same." —In witness whereof, &c.—dated 22 Dec. 1783.

PHILIP HALES, (L.S.)

(B. 4.) The following is a copy of Mr. Elderton's deputation to Mr. Dagge.

"Know all men by these presents, That I, Joseph Elderton, of the city of New Sarum, in the county of Wilts, gentleman, steward and bailiff of the manor and

and borough of Downton, in the said county of Wilts, Do hereby appoint John Dagge, of the parish of St. George, Bloomsbury, in the county of Middlesex, gent. to be my deputy steward of the said manor and borough, and bailiff of the said borough."—In witness whereof, &c.—dated the second day of April, in the year of our Lord 1784.

JOSEPH ELDERTON, (L. S.)

(B. 5.) The following is a copy of the appointment of John Snow, to the office of Steward.

"To all Christian people to whom these presents shall come, I Dame Mary Ashe, widdow and reliēt of Sir Joseph Ashe, late of Twickenham, in the county of Middlesex, Barronet, deceased, send greeting, Know yee that I, much confiding in the diligence and faithful circumspection and due obedience of my trusty servant John Snowe, of Loofehanger Parke, in the parish of Downton, in the county of Wilts, gent. Have given and granted, and by these presents doe give and grant unto the said John Snowe, the office of steward and the stewardship of all that my mannor and borrough of Downton, in the said county of Wilts, with all fees, profitts, allowances and advantages to the said office belonging; and I doe by these presents make, ordaine, and constitute him, the said John Snowe, chiefe steward of the maninor and borrough aforesaid, in as full, large and ample manner as by my lease of the mannor aforesaid I have power to grant it, To have and to hold, and to use and exercise the said office of steward and stewardship, together with all fees, profits, allowances and advantages to the same office belonging, unto the said John Snowe, by himselfe or his sufficient deputy or deputyes,

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from the day of the date hereof, for and during, and unto the full end and terme of three yeares from thence next ensuing, fully to be compleate and ended if Sir James Ashe, of Twickenham aforesaid, Knight, Martha Ashe, of Twickenham aforesaid, spinster, and Christofer Bedford, of London, gent. or any or either of them shall soe long live, and for and dureing the aforesaid terme of three yeares, I have also ordained, and by these presents have made and constituted and appointed him, the said John Snow, my bailiff of my manor aforesaid, and of the said borrough of Downton, and collector and receiver, as well of all and singular the rents, fines, amerciaments, herriots and estreats, which shall become due and payable unto me by vertue and authority of the courts, to be by him or his deputy or deputies holden within the manor or borough, as also for all and singular other my rents which now are, or hereafter shall be due and payable from all and every the tenants and farmers within the said manor and borough, except from such tenants which shall hold any farms, lands and tenements, at rack rent; Provided always, that if the said John Snow shall not, within one and twenty dayes next after notice in writinge by me, my executors or administrators, to him given, make and render a true account and reckoninge to me, my executors, administrators or assigns, of all and every the said rents, fines, amerciaments, heriots and estreats, and also well and truly pay, or cause to be paid to me, my executors, administrators or assigns, all and every such sume and sumes of money, as upon such account shall appear to be due, and to have been by him collected or received, that then, and from thenceforth this my deed and instrument shall be void and of none effect; And

And I do alsoe by these presents authorize the said John Snowe, to be my keeper and preserver of all the royalties and game within the manor aforesaid, which are granted to me, in and by my lease of the said mannor, and noe other, and to depute any person or persons under him to take care thereof, and to use all lawful meanes to apprehend and punish all such persons as shall, without any lycence, with gunns, netts, bowes, gunns, or doggs, come upon any parte of the said mannor, to destroy, hunt or disturbe the game aforesaid, contrary to his Majestyes lawes in that behalfe enacted and provided;" In witnesse whereof, &c. — dated 31 October 1696.

M. ASHE, (L.S.)

(B. 6.) The following is a Copy of Mawson's Deputation to Fletcher.

"To all persons to whom these presents shall come, I Thomas Mawson, of New Inn, in the county of Middlesex, gent. by vertue of a power, to me granted by Sir James Ashe, Bart. lord of the borough and manor of Downton, in the county of Wilts, have deputed, and by these presents doe substitute and appoint Leonard Fletcher, of the city of New Sarum, in the said county, gent. my deputy steward of and for the said borough and mannor, as to the holding and keeping of all and singular the courts-leet and court-baron, as shall be to be held and kept in and for the said borough and mannor respectively, with power to examine any feme-covert copyholder within the said mannor, who shall come to surrender her copyhold estate, as to her willingness to make such surrender, and afterwards to take

the same according to the custom of the said mannor, rendring to the bayliffe or receiver, for the time being, of the said Sir James Ashe, an account of all fines and herriots, from time to time arising, due and payable on any surrender or admittance made or given at the said court-baron; and also to me his steward of the said borough and mannor, all fees and perquisites of courts belonging thereto. And further, I the said Thomas Mawson, by vertue of the said power given to me by the said Sir James Ashe, lord of the said borough of Downton, have deputed, and by these presents doe substitute and appoint the said Leonard Fletcher my deputy bayliffe, of and for the said borough of Downton, as to the demanding and receiving of and from the high sheriffe, of the said county of Wilts, for the time being, or his deputy or undersheriffe, all and every writ or precept, directed to the bayliffe of the said borough of Downton, for the electing and returning one or more burgeses and burgessees to serve in parliament for the said borough, and to give a receipt for the said writ or precept, and afterwards to proceed thereon as thereby commanded, to elect and return in due form of law, such burgeses or burgessees to serve in Parliament; hereby ratifying and confirming all and whatsoever my said deputy shall lawfully do, or cause to be done in and about the premisses:” In witness whereof, &c.—dated tenth day of January, in the year of our Lord one thousand seven hundred and twenty-fix.

T. MAWSON, (L. S.)

(B. 7.)

(B. 7.) The following is a Copy of the Appointment of Mr. Eve, to the Office of Steward.

“ Know all men by these presents, That I, Anthony Lord Feverſham, baron of Downton, in the county of Wilts, lord of the hundred, borough and mannor of Downton aforeſaid, have made, nominated, conſtituted and appointed, and by theſe preſents do make, nominate, conſtitute and appoint John Eve, of the Cloſe of New Sarum, in the ſaid county of Wilts, gentleman, to be ſteward of the hundred and mannor of Downton, and alſoe to be ſteward and bailiff of the borough of Downton aforeſaid, to hold the ſaid office and offices of ſteward of the hundred and mannor of Downton, and alſoe ſteward and bailiff of the borough of Downton aforeſaid, with all and ſingular the rights, liberties, privileges, juridiſdictions and authority thereunto, or to either of them belonging, during my will and pleaſure :” In witneſs whereof, &c.—dated 26th day of November, in the year of our Lord 1756.

FEVERſHAM, (L. S.)

P. 120. (C.) In order to explain this return it is neceſſary to mention, that during this period, it was frequently the practice to chooſe the two members ſeparately, at different times, and ſometimes on different days; which eſtabliſhed the diſtinctions of *firſt* and *ſecond* members, to be met with in the Journals and other parliamentary books: (See 1 Doug. Elect. 287.) Though this did not always appear by the indentures of return, in which the election was often formally ſtated to have taken place on one particular day, different perhaps from both the real days, as in 1 Journ. 819, 820.

This distinction appears in almost all the cases in Glanville's Reports; in his account of the Stafford election (p. 26.) he says, "The said precept or warrant being read, Mr. Cradock was propounded and elected in the *first place* by a plurality of the voices of such as were then present, without any contradiction; but touching Sir William Walter and Mr. Dyott, for the *second place*, there was some difference,———" It generally happened, when there were three candidates, that the first member was chosen unanimously, and the opposition was made by the second. In the year 1625-6, one of the members for Bury having been chosen on the 6th of January, and the other on the 11th, and a question afterwards arising in the House, upon the beginning of the time of privilege of the second member, a member present delivered an opinion against *these straggling elections*, in which however no other seconded him. 1 Journ. 819, 820.

P. 134. (D.) We find in the form of this appointment, an instance of that affectation of stately grandeur, which distinguished the great Lords in the fifteenth and sixteenth centuries. They affected to have their *councils*, their *chancellors*, *chamberlains*, &c. The offices of state at present kept up in the dutchy of Lancaster, and in the dutchy of Cornwall under the Prince of Wales, are no other than those which formed the establishment of every great nobleman's family. When the duke of Buckingham was accused of high-treason, under Henry VIII. his *chancellor and others of his council* were at the same time sent to prison. (See 11 State Tri. p. 4 and 5. and Stowe's Chronicle.)

In this grant of the bishop, there is all the parade and ceremony of a royal charter; the instrument itself

is called a *Patent*,—he directs the accounts to be passed before *the auditors of our Exchequer*,—and the salary is to be paid, under the phrase, *We command our auditors, &c.*

Mr. Hume, in the last note to the third volume of his history, has given many particulars of the household establishment of an Earl of Northumberland, in the reign of Hen. VII. upon which he says, “It is amusing to observe the pompous and even royal stile, assumed by this tartar chief: He does not give any orders, though only for the right making of mustard, but it is introduced with this preamble, “It seemeth good to us and our council.”

P. 142. (E.) The reader may find some authorities to this effect in *Com. Dig. Tit. Grant. E. 9, 10, 11.* See also *Co. Lit. 307. a.*

P. 150. (F.) This case was adjudged in 1705 by Lord Keeper Cowper; there had been a devise of real and personal estate to trustees, to pay debts and legacies, and then to settle the remainder on *the son and the heirs of his body*, with remainders over; with directions that care should be taken in the settlement, that it should not be in the son's power to dock the entail. The question was, Whether the son should have an estate-tail conveyed to him by the trustees, or only an estate for life? The Lord Keeper decreed, that the settlement should be of a life-estate only, because being *executory*, the intent and meaning of the testatrix should be pursued, which is, that the son should not have it in his power to bar his children, as he would have, if an estate-tail were to be conveyed to him; but if an estate-tail *expressly* had been devised, the law must have taken place.

P. 156. (G.) In the case of Alston and Wells, Doug. Rep. 747. Lord Mansfield, in delivering his opinion, says—"It was said to be settled, that the court will not suffer a trustee to recover in ejectment, against the *Cestui que trust*: When this was mentioned on the trial, I said, that this rule is subject to the qualification of its being *clearly* the case only of a mere trust, for then by taking notice of it, the court prevents delay and expence; But it will not decide when there is a doubt, but leave the question to a jurisdiction, which regularly takes cognizance of matters of trust;—it being doubtful, whether the lessor of the plaintiff is a *mere* trustee, he is intitled to recover at law, as he certainly has the *legal right*."

In Buller's *Nisi Prius*, p. 108. (edit. 1772) it is said, that in the argument of the case of Lade and Holford, Lord Mansfield declared, that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited, by a term standing out, of his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but direct the jury to presume it surrendered.

Both these cases proceed upon a tacit admission of the law laid down by the counsel for the petitioners, and of the distinction they contended for, between disputes arising between trustees and *Cestui que trusts*, and those between either of them and third persons.

P. 161. (H.) The Stat. 8 Hen. VI. ch. 7. is as follows:—"Whereas the elections of knights of the shires to come to the Parliaments of our Lord the King, in many counties of the realm of England, have now of late been made by very great, outrageous, and excessive number of people, dwelling within

“ the same, of the which most part was of people of
 “ small substance and of no value, whereof every of
 “ them pretended a voice equivalent, as to such elec-
 “ tions, with the most worthy Knights and Esquires
 “ dwelling within the same counties, whereby man-
 “ slaughters, riots, batteries, and divisions among the
 “ gentlemen and other people of the same counties
 “ shall very likely rise and be, unless convenient and
 “ due remedy be provided in this behalf, Our Lord the
 “ King, considering the premises, hath ordained and
 “ established by authority of this present Parliament,
 “ That the knights of the shires, to be chosen within
 “ the same realm of England, to come to the Parlia-
 “ ments of our Lord the King hereafter to be holden,
 “ shall be chosen in every county of the realm of Eng-
 “ land, by people dwelling and resident in the same
 “ counties, whereof every one of them shall have free
 “ land or tenement (*frank tenement* in the original) to
 “ the value of forty shillings by the year at the least
 “ above all charges. And that they which shall be
 “ chosen shall be dwelling and resident within the same
 “ counties. And such as have the greatest number of
 “ them that may expend forty shillings by year and
 “ above, shall be returned by the sheriffs of every
 “ county knights for the Parliament, by indentures
 “ sealed betwixt the said sheriffs and the said choosers
 “ to be made. And every sheriff shall have power by
 “ the said authority to examine upon the Evangelists
 “ every such chooser, how much he may expend by
 “ the year. And if any sheriff return knights to come
 “ to the Parliament contrary to the said ordinance, the
 “ justices of Assizes in their sessions of Assizes shall
 “ have power by the authority aforesaid thereof to in-
 “ quire ;

“ quire ; and if by inquest the same be found before
 “ the justices, and the sheriff thereof be duly attaint-
 “ ed, then the said sheriff shall incur the pain of rool,
 “ to be paid to our Lord the King without being let
 “ to bail or mainprize ; and that the knights returned
 “ contrary to the said ordinance shall lose their wages.
 “ Provided always, That he which cannot expend
 “ forty shillings by year, as aforesaid, shall in no wise
 “ be choofer of knights for the Parliament ; And that
 “ in every writ that shall hereafter go forth to the she-
 “ riffs to choose knights for the Parliament, mention
 “ be made of the said ordinances.”

The stat. 10 Hen. VI. ch. 2. reciting the substance of the above statute, and that it omitted to limit the qualification to the county where the election is, explains it to be “ freehold to the value of forty shillings
 “ by the year at least above all charges, *within the same*
 “ *county* where any such choofer will meddle of any
 “ such election.”

The statutes prior to these upon the subject of elections seem principally directed against the power and partiality of sheriffs in making returns ; as 7 Hen. IV. ch. 15. 11 Hen. IV. ch. 1. 6 Hen. VI. ch. 4. By the first of these, intituled, “ The manner of election of knights, &c.” the sheriff is directed to proclaim the day of election in his full county-court ; “ and all they that be there present, as well suitors duly summoned for the same cause, *as other*, shall ——— in the full county, proceed to the election.” Perhaps it was under the authority of these words, that Mr. Prynne said, that “ before 8 Hen. VI. every inhabitant and commoner in each county, had a voice in the election of knights, whether he were a freeholder or not.” (See

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Brevia Parl. Rediv. p. 187.) but it is plain that this statute means only those who owed suit and service at the county-court. The stat. 1 Hen. V. ch. 1. in the same manner speaks of "Les chivalers, esquiers, & autres qui ferrount elifours."

It is curious to observe the different principles, that guided the cotemporary laws upon this subject in Scotland. In that kingdom, the personal attendance in Parliament of the King's freeholders, was but just then beginning to be dispensed with; By the Scotch Act 1427, cap. 101. the *libere tenentes* were relieved from the burthen of attending Parliament, upon condition of their sending two commissioners from each shire. Perhaps their King James I. who had been prisoner in England from his youth, and received his education here, wanted to put the Parliament of Scotland upon the same footing with that of England. (See 1 Robertson's Hist. Scot. p. 48. and Kaim's Antiq. 3d edit. p. 41.) Notwithstanding this law, personal attendance continued to be enforced, and in the reign of James II. (Scotch Act 1457, cap. 75.) it was provided, "That no freeholder under 20l. should be constrained to appear in Parliament." Thus in England service in Parliament was contended for, and election became a *right*, at a time when in Scotland it was contended *against* as a *burthen*. It should be observed, however, that the situation of England at this period, was that which in all ages and countries, has been peculiarly favourable to the power of the *Estates of the Realm*; It was the long minority of Hen. VI. that gave so much importance to Parliament, and consequently to parties in the nation, from whence the disorders

orders in elections, provided against in the statute, took their rise.

By the Scotch act of James I. every freeholder had a voice in the election of commissioners; but in Scotland subinfeudations had not multiplied as in England, and their number was comparatively very small, as appears from the practice of personal attendance continuing after this act. It was not till the reign of James VI. in 1587, that the right of election was limited to those who were possessed of *forty shillings land in free tenantry*. Wight. Laws Elect. Scot. 33.

P. 161. (I.) Several years before the passing of the stat. 7 & 8 W. III. ch. 25. a distinction of the same sort as that established by sect. 7. had taken place in the law of Scotland. By a Scotch statute in 1681*, Apprisers or Adjudgers, (*who resemble our tenants by elegit, with this difference, that they have the freehold*) were declared to have no right to vote during the legal, (*or time allowed for redemption*) but that the heritor, (*or owner of the land*) should continue to vote himself; after the expiration of the legal, the right devolved to the appriser. It was necessary by our law to *deprive* a mortgagee of this right, but upon the same principle in Scotland, it was necessary to *give* it him; accordingly, the same statute allows the privilege to proper wadsetters, and takes it from the reverser (*or mortgagor*); a proper wadsetter being in fact, what our mortgagees are generally only in name, the possessor of the land.

* Wight Laws Elect. Scot. 39.

P. 163. (K.) The stat. 19 Geo. II. ch. 28. regulates the mode of election in cities or towns that are counties, and provides that in those in which the right of voting is in forty-shilling freeholds, the person claiming to vote, must have a freehold there of that value clear, must have been in possession a year before, (except in the usual cases, of descent, &c.) and that no person shall have a right to vote by a freehold granted to him fraudulently, on purpose to qualify him to vote: The statute prescribes the form of an oath for ascertaining the foregoing particulars. There are several clauses in this act for making these restrictions effectual, but the last section excepts from the above regulations, such counties corporate, "where the right of voting — is for or in respect of *burgage-tenure*, or where the freehold is not required to be of the value of forty shillings."

P. 165. (L.) Before trusts were introduced and formed into a system, in consequence of the statute of uses *, there were statutes made to prevent some of the legal effects of the doctrine of uses at common law; whereby the *Cestui que use* was invested with some of the qualities of ownership, and the *feoffee to uses*, (or *trustee*, according to the modern phrase) was restrained in the exercise of his legal power. Thus, the *Cestui que use*, if in actual possession, was liable to actions †, and could make leases to certain purposes ‡; but still no legal estate in the land, could be derived from any but the trustee §; the land could not be extended for

* 27 Hen. VIII. ch. 10.

† By 4 Hen. IV. ch. 7. and 11 Hen. VI. ch. 3.

‡ By 1 Rich. III. ch. 1.

§ 1 Rep. 140. 2.

the debts of the *Cestui que use*, and escheated to the lord upon defect of heirs, or attainder of the trustee.

Judge Blackstone has made an excellent compendium and historical deduction of the law of uses and trusts, in the second book of his Commentaries *, in which he illustrates all the general principles which formerly governed uses, and are at present practised in trusts. In conclusion he observes, "The trustee is considered merely as the instrument of conveyance, and can in no shape *affect the estate*, unless by alienation for a valuable consideration, to a purchaser without notice." It seems to me that this observation is not to be taken absolutely, but *sub modo*, according to the subject matter of his discourse, which is to explain the connection between a *Cestui que trust* and his trustee, without entering upon the principles of the connection of either, with *third persons*. I think I am warranted in this, by the arguments in the great case of *Burgefs* and *Wheate*, in the learned Judge's reports †, which contain the materials from whence he seems to have digested his commentary above referred to.

P. 178. (M.) In the case of *Downton* reported by Mr. Douglas, as well as on the present occasion, this definition of a burgage was adhered to with great strictness. However necessary it may be thought, upon modern principles, I am persuaded that this notion of *entirety* and *indivisibility*, and the distinction between freeholds of burgage-tenure, and other borough-freeholds, are but modern; I think this appears from the reports of contested elections in these boroughs, in the Journals of the latter part of the last century, and be-

* Chap. 20. p. 327, &c. † 1 Black: Rep. 123.—186.

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ginning of the present. It is impossible otherwise to account for the number of irregular burgage-rents in this and other boroughs of burgage-tenure, payable for tenements having an acknowledged right of voting. One of the burgages in Downton appeared to pay *sevenpence halfpenny*. In Clithero, where the regular burgage-rent is 1 s. 4 d. there are burgages paying 8 d. called *half-boroughs*, and others paying 6 d. and 4 d. In Pontefract, (which is of burgage-tenure, though not of burgage-representation) where the rent is a shilling, and has been so from the time of Richard the First *, there are burgages paying 6 d. and 8 d. In Westbury, either 4 d. or 2 d. is a burgage rent. In Bereafston, the resolution of the House allows rents of 3 d. or more. These instances sufficiently confirm the observation of the counsel in page 188, that these fractions of rent were in their beginning a deviation from the entirety.

It is natural to suppose that originally in these boroughs all the inhabitant freeholders voted at elections; the expression "inhabitants of *burgage houses*," which frequently occurs in them, leads to this observation; for one burgage might be divided into many tenements, and as many freeholds, and the rent might be apportioned according to the subdivisions. Entries were read to the Committee from the borough book of Downton, of several alienations of one burgage, in parts paying *three halfpence rent* each.

P. 185. (N.) The expression of "*lease and release*" now applied to this mode of conveyance, is not altogether proper, because the operation of the first deed

* See before, p. 101.

is not as a *lease*, but as a *bargain and sale* (2 Mod. 251. 2 Black. Com. 339.) Accordingly, the original name for the conveyance was, "*bargain and sale for a term and release*." Sir Matthew Hale, in his preface to Rolle's Abridgment, uses this as the technical and common phrase. The words *demise* and *lease* frequently inserted in this instrument, are mere surplusage, and are omitted in that form of it which Blackstone has printed as a model of the conveyance *, in which the operative words are only *bargain* and *sell*. The doubts which are said to have been entertained formerly upon this conveyance †, probably arose from considering the bargain and sale as a *lease*, as it was often called; because no lessee of a term could receive a release of the reversion before his actual entry ‡, the statute of uses not operating upon such a conveyance. But when the validity of this mode of conveying land was first established, in the 18th of James I. (Cro. Jac. 604), the courts considered, that by a bargain and sale made by the owner of the land *in possession*, (this circumstance being originally held requisite) he became seised to the use of the bargainee for the term, and then the statute vested the possession in him, from whence he derived a capacity to take a release.

The great distinction of the common law between things which lie in *grant*, and things which lie in *livery* §, is almost reduced to be a distinction without a difference, by the general use of conveyances by lease and release, which operate in the manner of a *grant*, upon things in livery.

* 2 Black. Comm. App. N° 2.

† 2 Mod. 252.

‡ Litt. sect. 459.

§ See Co. Lit. 9. a.

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Although Judge Blackstone treats only of the conveyance by lease and release, as derived from the statute of uses, yet it appears, from what Lord Chief Justice North says, in 2 Mod. 251, 252. that it was not an unusual mode of conveyance at common law, the lessee then actually taking possession under his lease; from which practice, perhaps, the phrase of "lease and release" came to be applied to a mode of conveyance so essentially different from that of the common law which bore this name.

P. 188. (O.) The counsel in this part of the argument said, a case had happened lately at *Nisi Prius*, in which it had been held, that a plea of Tender was not supported by evidence of an offer 'to pay, if the creditor would give a receipt for the money;' in which case it had been agreed, that you cannot compel your creditor to give a receipt. In Viner Abr. tit. *Acquittance*, A. 13. it is said to have been mentioned at the Rolls in Nov. 1738, by the Master of the Rolls, and agreed by several of the counsel, *that in no case payment may be refused, unless an acquittance be given.* The cases stated by Viner under this title, shew, that the above saying is to be understood of matters of *simple contract*; for in single obligations, statutes merchant, and debts from the crown, it appears that payment may be refused, unless an acquittance is given. I can suppose a sufficient reason for this rule in the two latter cases, because they are debts of record, for the discharge of which some specialty should be averred in pleading; the same was formerly the law in actions on single obligations: But since by modern statutes and practice they are put upon the same footing with conditional

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obligations, in point of pleading, there can be no reason *now* for distinguishing them in this respect. In simple contracts, the doctrine in question seems to have been established in very antient times, as may be seen in two cases in the reign of Richard II. cited in Vin. Abr. tit. *Account*, P. pl. 6 & 7.

P. 207. (P.) This doctrine is fully established: The notion of *adverse possession* contended for by the counsel for the sitting members, seems taken from cases of tenancy in common, in which the law *presumes against* an adverse possession, unless actual ouster be proved; as in the cases of *Empson and Shackleton*, 5 Burr. 2604. 2 Blac. 690. *Davenport and Tyrrel*, 1 Blac. 675. *Reading and Royston*, Salk. 423. and Lord Raym. 830. and in a late case of *Coppinger and Keating* in B. R. Mic. 22 Geo. III. (not reported) in which all the former cases were considered. But in other estates, there is no such presumption of law. Lord Mansfield in *Prosser's case*, Cowp. 218. says, "Some ambiguity seems to have arisen from the term '*actual ouster*,' as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary: But that is not so;—A man may come in by rightful title, and yet hold over *adversely* without title: If he does, such holding over, under circumstances, will be equivalent to *actual ouster*.—If tenant *pur autre vie* hold over for twenty years after the death of *cestui que vie*, it will, in ejectment, be a complete bar to the remainder man or reversioner, because it was *adverse* to his title." *Prosser's* was the case of a tenancy in common.

P. 211. (Q.) Lord Hardwicke, in the case of Hawkins and Chapel, upon a question of a resulting trust, says, "It never was allowed in equity, that trustees by postponing or accelerating a sale, should make any alteration in the interest of the *cestui que trust*; because such an admission would be putting it in the power of the trustees, by fraud or collusion, to destroy the whole intention of a testator." 1 Atk. 623.

I have not been able to find any case establishing the position laid down by the counsel for the petitioners, that under such a will as Lord Feverham's, the obligation of offering to a particular purchaser, gives the beneficial interest in the trust, to such intended purchaser.

P. 212. (R.) In the case of Allen and Sayer, 2 Vern. 368. a doctrine, apparently different, was established by Lord Chancellor Somers. There was a devise of lands to trustees to pay debts, then to the plaintiff, (an infant) and his heirs; the defendant entered on the estate, and levied a fine; five years past; the plaintiff brought an ejectment as soon as he attained his full age, but was barred by the fine and non-claim. He then brought his bill in Chancery for relief, where it was determined, that although the fine and non-claim was a good bar at law, the legal estate being in the trustees who were of full age and ought to have entered, yet the plaintiff ought not to suffer for their *laches*, being then an infant, and having pursued the proper remedies since attaining his majority; that the fine should not run upon the trust during the minority: And therefore possession was decreed to the plaintiff, and an account of the profits.

The above case is not mentioned or referred to, in that of the East India Company: The case referred to by Peere Williams, is that of the Earl and Countess of Huntingdon, in which Lord Chancellor Parker was of opinion, but did not determine the point, that a fine and non-claim should, in favour of a purchaser, bar a trust term, though the *Cestui que trust* was an infant.

Perhaps upon an examination of the true principles of these decisions, it will be found that they are not contradictory. It is a principle of equity, that if a stranger enters upon an infant's estate, and receives the profits, he shall be looked upon as a trustee for the infant. (2 Vern. 342. and 1 Vern. 295.) The case of Allen and Sayer is not fully stated in the report, but it seems to have fallen within this principle, the defendant there being ordered by the decree *to account*: It is adopted as such in 1 Equity Cases Abridged, 281. In the Earl of Huntingdon's case, the opinion was *in favour of a purchaser*. In the case in P. Williams, the Chancellor says, he cannot set aside the plea, *the defendants being in no default*. So that the doctrine in all of them is consistent, when considered as establishing the following distinction: viz. Where the party has not *by his own act* incroached upon the infant's estate, but is merely passive in the acquisition of that defence which the efflux of time gives him; or if he has acquired a positive right of possession by his own act, *by honest means*, in either case the title shall not be disturbed, and the effect of the limitation shall be absolute. But where the foundation of the title is tortious, by the party's own act, he shall not be allowed in equity to avail himself of the effect of a legal limitation in a legal estate, against the equitable or beneficial owner: i. e. He shall be in the same situation

situation in *equity*, with respect to an *equitable* estate, as he would be in at *law*, in the same circumstances, with respect to a *legal* estate; For if the infancy, (the gift of the case) could come properly before the court of law, in the legal question, the period of limitation in such cases would be no defence. If I am right in these observations, the possession of the burgage in question, by Mr. Duncombe and his family, is within the reason of the judgment in *P. Williams*; being a possession devolved upon him, without any tortious act of incroachment upon the infant's estate, and therefore capable of confirmation by length of time, even against the claim of infancy.

P. 235. (S.) Judge Blackstone speaks with remarkable caution on this subject; he says, "a deed must be written, or, *I presume*, printed."

Lord Coke in another place, (*Co. Lit.* 35. b.) uses the same expressions as those cited by the counsel, and refers to cases in the year books as his authorities for proscribing the several materials enumerated, as wood, stone, leather, &c.—The case in which wood is proscribed is curious, on which account, as it is short, I transcribe it from *F. N. B.* 283. "If a man make a *tally*, and make bond thereupon, and seal and deliver it as his deed, yet it shall not bind him, but he may plead against the same, that he owed him nothing, or may wage his law. For an obligation ought to be made in writing in parchment or paper, and not written on any piece of wood, as a *tally* is." Fitzherbert cites the case from 25 Edward III. 40. and other year books of the same antiquity.

P. 252. (T.) By 9 & 10 Will. III. ch. 25. sect. 58.
—“All vellum parchment and paper herein before charged, shall, before any of the matters or things herein before mentioned, be thereupon engrossed or written, be first brought to the head office for the said duties to be stamped and marked &c” — By sect. 59 (which also adds a penalty of ten pounds to any informer, on any who write on vellum &c before it be stamped)—“if any deed instrument or writing whatsoever by this act intended to be stamped as aforesaid, shall contrary to the true intent and meaning thereof be written or engrossed by any person or persons whatsoever, upon any vellum parchment or paper not marked or stamped according to this act, or upon vellum parchment or paper marked or stamped for a lower duty as aforesaid; That then and in every such case there shall be due answered and paid to his majesty his heirs or successors, over and above the duty aforesaid, for every such deed instrument or writing the sum of 10l. : And that no such record deed instrument or writing shall be pleaded or given in evidence in any court or admitted in any court to be good, useful, or available in law or equity, until as well the said duty as the said sum of ten pounds shall be first paid to the use of his majesty his heirs or successors, and a receipt produced for the same under the hand or hands of some of the officers which shall be appointed to receive the duties abovementioned, and until the vellum parchment or paper, on which such deed instrument or writing shall be written or made, shall be marked or stamped with a lawful mark or stamp or with double marks or stamps according to this act. And the proper officers are hereby enjoined and required, upon payment or tender of the said duty and
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the sum of 10l, to give a receipt for the same and to mark or stamp the said vellum parchment or paper with the mark or stamp that shall be proper for such deed instrument or writing respectively."

By the first stamp act 5 W. & M. ch. 21. s. 11. the penalty for writing on paper &c before it is stamped is 500l, and the subsequent penalty to the King is 5l.; in other respects that section is the same as that above recited.

By 1 Ann. stat. 2. ch. 22. sec. 2.—"if any person shall write any matter or thing in respect whereof any duty is payable, on any vellum &c whereon there shall have been before written any other matter or thing, in respect whereof any duty was payable by the said acts, before such vellum &c shall have been again marked or stamped; or shall fraudulently erase or scrape out the name of any person or other thing written in such writing as aforesaid, or fraudulently cut tear or get off any mark or stamp from any vellum &c with intent to use such stamp for any other writing, in respect whereof any duty shall be payable; In every such case every person so offending shall forfeit the sum of 20l. with full costs of suit." By the section following it is declared, that the offender against this act shall likewise incur all other forfeitures and disabilities which he would have incurr'd, if he had been convicted of writing contrary to the said acts on any vellum &c not stamped according to the said acts—The title of this act is "for preventing frauds in her majesty's duties upon stamped vellum parchment or paper."

The stat. 12 Ann. stat. 2. ch. 9. sect. 25. has a similar provision, almost in the same words as 9 & 10 W. III. ch. 25.—So in the 12 Geo. I. ch. 33. sect. 8. In

this and the preceding statute, the expression is "no such matter or thing shall be available in law or equity, or be given in evidence or admitted in any court, unless as well the said duty hereby charged" as the penalty of 5*l.* be paid at the stamp office.

The stat. 12 Geo. I. ch. 33. which was made for a term of years, is made perpetual by 23 Geo. II. ch. 25. sect. 2.—By 30 Geo. II. ch. 19. sect. 25. the powers and penalties of former acts are continued upon the duties of that act, and a similar clause is inserted in the subsequent stamp acts.

P. 254. (U.) It is curious to compare the line of argument followed upon this occasion, with that of the Downton cause reported by Mr. Douglas (See his Vol. I. p. 222, 223). The counsel for the sitting members now urged as an argument in their favour, those circumstances of occasionality, which in the former case had been strenuously denied in defence of the same side, or at least, in defence of a similar interest. It was then said, that the grantees might take possession of the land, recover the profits in an action for money had and received, or the deeds in trover or by bill in equity.

After having seen the principles here alluded to, upon which many leading points in this cause were conducted, and the latitude acquiesced in*, it may perhaps raise surprise in some readers to find, on the other hand, so great restriction mutually observed, in the exact and minute inquiries into the title of some of the voters. After admitting, that a conveyance may be made for no other purpose but that of voting, and that a posses-

* See p. 241, 259.

sion under it is not necessary, it seems inconsistent to require, in the same cause, as much nicety in the proof of real title, as upon the trial of an ejectment; although in cases of the occasional conveyances, where no possession is had, some proof of title must necessarily be given, in order to identify the burgage. Perhaps, there may be no offence in saying, (as the judges have said upon *common recoveries*, since they have ventured to speak out upon the subject) that the system requires the *actores fabulæ* to sustain their parts with propriety: Having established a formal mode of representation, it is necessary to preserve the formalities in full force, as a compensation for the want of substance.

If something like this were not understood upon these occasions, it might be said, that as to proof of title, if the grantor and grantee of any property are satisfied upon the subject, no others can have cause to complain; as in cases of corporate rights of voting, it might be said in the same manner, that if burgesses are acknowledged by their corporation to be properly qualified, their defect of title can be of no concern to others in the exercise of an incidental right belonging to it. Yet here too, Committees of election allow of a strict inquiry into title. I think Mr. Douglas, in a note upon the case of Peterborough *, has mentioned the true reason by which this practice is secretly directed, "the privilege of voting must be presumed to be the object in contemplation at the time of acquiring the right." The natural judicature therefore for inquiring into this right, is the Committee of election, and their power being only judicial and subordinate, they cannot abolish abuses existing in the law; they can

* Vol. III. p. 145.

only apply legal modifications ; the effectual remedy must proceed from the legislature.

P. 256. (V.) In Strange's Reports, Vol. I. p. 624. the Bishop of Chester's case, a patent produced in evidence, had not been duly stamped at the time of sealing, or at the time when it was first produced ; and the whole court were of opinion, it was proper evidence, being stamped at the time when it was produced at the trial : For, they said, the act never intended to avoid deeds that were not stamped, but only to add a penalty to enforce the duty, and here the penalty had been paid.

Perhaps the expression '*first produced*,' in the above case, refers to the practice mentioned by the counsel for the sitting members in p. 255. In the same Reports, p. 575, and 716, are cases which put the same construction upon the stamp acts as in the Bishop of Chester's case ; in the former of these, the want of stamp at the trial, being supplied before the motion for a new trial, which was occasioned by this defect, was not thought to be sufficient cause for a new trial.

P. 257. (W.) By the rule of law, a man is not to suffer any disadvantage by not having the possession of a deed, which remains in court upon a *profert*, but may make any use of it in pleading, that his case requires. Litt. Sect. 375. Co. Litt. 231. b. By analogy to this rule, therefore, the sitting members ought not to lose any benefit they might be lawfully intitled to, by the production of these deeds,

P. 258. (X.) In Co. Litt. 171. b. a deed is defined to be "an instrument consisting of three things, viz. writing, sealing, and delivery, comprehending a bargain or contract between party and party." It appears by Co. Litt. 36. a. that every delivery of a deed is an *absolute* delivery, according to the tenor of the deed, unless the contrary be expressed at the time. The authorities cited in Com. Dig. tit. *Fait*. A. 3. shew the same thing. When a conditional delivery is expressed, that for a time suspends the operation of the writing as a *deed*, and it remains an *escrow*. Perkins, sect. 129. 2 Black. Com. 307.

P. 268. (Y.) The following case in 5 Burr. 2673. is very applicable to this question. An action for the penalty given by 1 Ann. stat. 2. ch. 22. s. 2. * was brought against one Babb, who in 1760 executed a letter of attorney, on proper stamps, to two persons for the purpose of receiving a debt; the execution was attested by two witnesses, and one of the attornies had demanded payment without effect. Babb, in 1769, erased from this paper the names of the former attornies, the date, and the names of the witnesses, and again sealed and delivered the same paper with the same stamp, thereby making J. S. (a different person,) his attorney; which re-execution was attested by two other persons, whose names and that of J. S. were written upon the erasures, as was the new date of 1769.

The judges of the King's Bench were clearly of opinion, that Babb had incurred the penalty, and accordingly the plaintiff had judgment.

It seems to me, that the argument upon the Stamp-acts in the cases of Scott and Goodfellow, may be re-

* See before, p. 311.

duced to this state: Either the first grant conveyed the land, or it did not; if it did, new stamps alone would not be sufficient to convey the land from the original grantor, but the conveyance should have proceeded from the first grantee. If it did not, then the first stamp was sufficient, because it was a *new grant* to the present voters; for the Stamp-acts can hardly be construed to require payment of a new duty, for the alteration of ineffectual words in a deed.

P. 245. (Z.) In Pigot's case 11 Rep. 27. a. it was determined, that "deeds may be avoided by *erasure, interlining, or other alteration in any material part*, unless a memorandum is made of it at the time." This and many other cases there cited (in particular, Mathewson's, in 5 Rep. 23.) lay down this law *for the benefit of an obligor*; it is said, such deeds *may be avoided* by pleading *non est factum*. The cases suppose an obligor to take this advantage in an action brought against him; but I have not met with a case, in which, as between third persons, this doctrine is established. Perkins tit. *Deeds*, sect. 122, and 128. says, these circumstances are *suspicious*. In the resolution of the court in Leyfield's case, 10 Rep. 92. b. it is said, "Every deed ought to approve itself——"

"First, As to the composition of the words, to be sufficient in law; and the court shall judge of that.

"Secondly, That it be not razed or interlined in material points or places; and upon that also in antient time the judges did judge upon their view the deed to be void—but of late times the judges have left that to be tried by the jury, i. e. *whether the rasing or interlining were before the delivery*."

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The old law upon this subject was very strict, as appears by Fleta, lib. 6. cap. 34. "Apparere autem debet omnis carta in primâ sui figurâ, absque omni vituperatione, rasurâ, vel cancellaturâ; calumniosam verò scripturam in judicio proferre, non convenit. Sunt tamen quædam in scriptis, quæ levem inducunt præsumptionem, & hujusmodi levia vitia vinci poterunt per veram testium probationem, & per patriam; ut si in scripturâ inveniatur diversitas calami, vel atramenti, vel manûs.——"

P. 264. (AA.) By 10 Geo. III. ch. 16. s. 25. (Grenville's bill) it is enacted, "That if the Committee come to any resolution besides the final determination, they may, if they think fit, report it to the House *for their opinion*, at the same time with the other; and the House may confirm or disagree with such resolution, and make such orders thereon, as to them shall seem proper." It may be doubted, how far a resolution like that in question is within the description of this section, because it does not seem to be one of those upon which the House is to give *their opinion*. In the cases of Shoreham in 1770, 33 Journ. 69, 70, 102.— of Shaftesbury, 2 Doug. Elect. 311. and of Hindon, 1 Doug. 177. the resolutions were such as called for the opinion of the House, requiring its assistance to carry them into effect.

P. 269. (BB.) The name of this case was *Gough* and *Cecil*: One of the gentlemen who was counsel in this cause, has favoured me with the following state of it: It was an action on a bond, tried at the Common Pleas sittings after Easter Term 1784; the subscribing

witness being dead, the plaintiff's counsel called a witness to prove his hand-writing; and the judge who tried the cause, being of opinion that this was not sufficient, without proving at the same time the hand-writing of the obligor, called upon the counsel for such proof; and upon their not being able to produce it, directed the plaintiff to be nonsuited. In Trinity Term it was moved to set aside this nonsuit, and the court decided that the judge's opinion was wrong, that the plaintiff had produced the proper evidence in such a case, and accordingly set aside the nonsuit.

P. 272. (CC.) This case is reported under the name of *Lowe and Jolliffe*, though for a different point, in 1 Black. Rep. 365. At the trial the three witnesses to the will, and two to the codicil, and the servants of the family, swore to the testator's insanity at the time of making them. It does not appear in the report, that any objection was made to the examination of the counter-evidence, which finally determined the verdict; the witnesses did not deny their attestations according to this report. Lord Mansfield, in the case of *Abbott and Plumbe*, Doug. Rep. p. 206. says, "It was doubted formerly, whether, if the subscribing witness denies the deed, you can call other witnesses to prove it: But it was determined by Sir Joseph Jekyll, in a cause which came before him at Chester, that in such case other witnesses may be examined; and it has often been done since." In the case of *Pike and Badmering* (before Sir Joseph Jekyll's time), cited in Stra. 1096, all the witnesses to a will denied their hands, and the court admitted other evidence to contradict them, upon which the will was supported. In the state of this case

in the law of *Nisi Prius*, 260. it is said, that the court obliged the party, against his inclination, to call the *subscribing* witnesses first. Another case of the same sort (Austin and Willes) is there cited.

P. 275. (DD.) While the counsel were arguing this point, they were asked by a member of the Committee, if there was not a case reported in which it was held, that one who thought himself under an obligation, which was honorary only and not binding in law, to pay the costs, could not be a witness: One of the counsel answered, that if there were any such case, this law was not established by modern practice. I have searched for the case alluded to, and suppose it to be that of *Fotheringham* and *Greenwood*, 1 Stra. 129. in which the above doctrine is said to have been followed by Lord Chief Justice Pratt at *Nisi Prius*.

P. 278. (EE.) This statute directs the polls of contested elections in *counties*, to be regularly taken by clerks appointed for the purpose. But there is no express provision (that I know of) for this regularity in *towns*. The 6th section of this act may be construed to *imply* it, by requiring all mayors and other officers, who take an election, "to give copies of *the* poll taken at such election," to those who desire it, paying reasonably for the copy. But as this clause inflicts a penalty of 500l. for every offence contrary to the statute, it would in this respect be understood by the expression "*the* poll," to require copies to be given, only when a poll was in fact *taken in writing*. The stat. 19 Geo. II. ch. 28. regulates only the elections for towns that are counties; but in this also the direction for taking a
poll

poll in writing is by implication from sect. 6. by which the returning officer is directed "to allow a cheque-book for every poll-book for each candidate." Perhaps it may justly be inferred, from the want of an express provision for this purpose in the statutes, coupled with the long usage, that by law the returning officers are officially bound to take a poll in writing.

V.

T H E

C A S E

Of the COUNTY of

B E D F O R D.

Y.

The Committee was chosen on Tuesday, the 22d of June, and consisted of the following Members :

Richard Aldworth Neville, Esq; Chairman.

Thomas Kemp, Esq;

Isaac Hawkins Browne, Esq;

John M'Bride, Esq;

Hon. James Jefferies Pratt.

Hon. John Eliot.

Hon. John Levison Gower.

George Bridges Brudenell, Esq;

Paul Orchard, Esq;

Edward Phelips, Esq;

Gerard Noel Edwards, Esq;

Sir Edward Littleton, Bart.

Hon. John Charles Villiers.

NOMINEE,

Of the Petitioner,

Lord Mulgrave.

Of the Sitting Member,

Hon. Thomas Pelham.

PETITIONER,

Robert Henley Ongley—Lord Ongley, of the Kingdom of Ireland.

Sitting Member,

Hon. St. Andrew St. John.

COUNSEL,

For the Petitioner,

Mr. Rous and Mr. Douglas.

For the Sitting Member.

Mr. Graham and Mr. Le Blanc.

T H E

C A S E

Of the COUNTY of

B E D F O R D.

THE petition stated, That at the last election for Bedfordshire, the candidates being the petitioner, the Earl of Upper Offory, and Mr. St. John, the votes of two persons who had voted for the petitioner, had been entered in the poll-book as given for the two other candidates; and the vote of a third who had voted singly for the petitioner was not entered at all in the poll-book; That the mistake concerning the vote of William Lugsden, one of the two first, was discovered before the close of the poll, and application was made to the sheriff to correct it, and evidence offered to him for the purpose, which he

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refused

refused to receive; That at the close of the poll he declared the numbers to be, for Lord Offory 1050, for Mr. St. John 974, for the petitioner 973, and falsely made the return in favour of the two former; whereas of the votes received by the sheriff the petitioner had a greater number than Mr. St. John, and ought to have been returned in his stead; therefore praying that the said false return might be amended*.

When the above petition was read in the House (May 25) it produced a debate upon the effect of an order made in the beginning of the same day, whereby election petitions were arranged in four different classes, according to which they were to have priority of appointment.

1. Those complaining of double returns.
2. Those concerning members returned for two places.
3. Those complaining of returns only.
4. All other petitions (A).

It was said on one side of the House, that the above petition was against the

* Votes, 25 May, p. 19.

return only, which was denied on the other. The debate was concluded by negativing the following motion, viz.

That the said petition does not relate to the return only.

In consequence of this decision, the petition was placed in the third class, and took its turn of appointment accordingly.

Another petition of freeholders in the interest of Lord Ongley against Mr. St. John, on the merits of the election, was presented to the House on the 3d of June, and ordered to be taken into consideration on the 12th of October, in the regular course of petitions on the merits*: But this order passed after much debate in the House, occasioned by the desire of Mr. St. John's friends, to obtain an order for taking the latter petition into consideration at the same time with that of Lord Ongley, a motion being made for this purpose. It was opposed upon the ground of the distinction between trials of the *merits*, and of the *return*, which, it was said, ne-

* Votes, 3 June, p. 136.

cessarily required a separation of the causes (B.)

Afterwards, on the last day for receiving election petitions, a petition was presented to the House from certain freeholders of Bedfordshire in the interest of Mr. St. John, setting forth, in answer to Lord Ongley's petition, that several votes specified in their petition, which had been given for the two sitting members, were entered on the poll to have been given for Lord Ongley—and praying redress. It was moved to refer this petition to the Committee upon Lord Ongley's: Some members thought it irregular to admit petitions of this sort in behalf of *sitting members*, and therefore opposed the motion, alledging that the election Committee would necessarily, and of course, allow to the sitting member in his defence, the advantage of those circumstances contained in the petition, if they should be thought proper for his defence. Others contended for receiving the petition and referring it expressly to the Committee, because that would oblige them to inquire into the facts, and not leave the inquiry to their

their discretion (C). At length, the member who presented this petition, thought proper to withdraw it.

When this cause came on before the Committee, the petition being read, the counsel for the petitioner opened their case: They insisted chiefly upon the circumstances alledged with regard to Lugsden, and proceeded to call the evidence in support of them. The poll-book of the hundred of Stoddon was read, in which it appeared that William Lugsden had voted for *Lord Ossory* and *St. John*; after which they called Lord Ongley's check-clerk for that hundred, in order to prove the mistake of the above entry: Hereupon the counsel for the sitting member took an objection to the competency of the evidence.

They contended, That an inquiry into the state of any vote *in the poll*, is an inquiry into the *merits* of the election; That therefore any evidence to that effect must be improper in the trial of a question on the *return* only; That although this point came before the Committee with some sort

of prejudication by the House, yet their order of reference could not alter the nature of the case, nor be considered by the Committee as any direction in point of law, because the statute invests the Committee alone with authority to decide fully and finally, all questions of elections and returns.

That the distinction established by many cases in the Journals, between the merits of an election and the return, is this : — Questions upon the return only, are those which depend entirely upon circumstances *extrinsic* to the poll or state of the votes ; and where the matter of the petition is consistent with the poll as it stands, but alleges the return to be bad for something *collateral* to it : But to examine into the votes is, in all cases, entering upon the merits of the election.

The questions upon the return, which are to be found in the Journals, may be comprehended under these descriptions :

1. When the right or power of the returning officer is disputed.

2. Where

2. Where the officer has not duly proceeded to the election ; such as the case of Cambridgeshire in Glanville, (p. 80.) where the sheriff would not take a poll, but returned one party : or where due notice is not given, or votes are received after the close of the poll, as the case of Arundel in Glanville, (p. 71.) and other cases of the same sort.

3. Where, without the default of the officer, a due election is prevented, as in the case of Morpeth (1 Doug. Elect. 147.) by riots.

In all these cases the above distinction is plainly marked out.

But supposing it competent to the Committee to enter upon this question, the particular circumstances of the case afford a strong argument against their receiving the evidence offered. The poll-book, which is the instrument from whence the sheriff derives the information necessary to make his return, is the declaration of an officer upon oath to another under the same sanction ; there is a strong legal presumption that such acts are valid, and they ought

ought not to be shaken till after good cause is shewn to weaken this presumption; When the whole case is gone into, in a course of proceeding upon the merits, there will be a proper opportunity for doing this; but in the *first instance*, the poll is conclusive as to what it purports; and the Committee, who are now to determine extrinsically upon the validity of an official act, should incline to support one made under the solemnities of the law.

For this reason, the evidence offered cannot be sufficient, *on the present occasion*, to set aside the return, because it contradicts the poll, and can be no more than oath against oath, the assertion of a stranger against the act of an officer.

There are many authorities in the Journals enforcing this doctrine, in a manner pointed to the present question. In the case of Rutland, in 1710. 16 Journ. 463. "One Samuel Freeman being offered to prove persons voting on the sitting member's behalf, who are entered on the sheriff's poll to have polled for the petitioner,—The question being put that Samuel Freeman be
admitted

admitted to prove his voting—contrary to the poll then taken by the sheriff. It passed in the negative.”

If it should be urged that this case might have proceeded upon any peculiar objection to the evidence of the voter *himself*, the case of Bedfordshire, in 1715, in 18 Journ. 224. will shew the true ground of the decision; there “a witness being called to prove that one William Reynold voted contrary to what appears by the sheriff’s poll, which being objected to by the petitioner’s counsel, and both parties being heard; Upon the question, That the counsel—be admitted to examine Edward Kemp, to prove that William Reynold voted otherwise than he is set down in the sheriff’s poll, It passed in the negative.” In the case of Southwark, in 1735. in 22 Journ. 554. the same thing was attempted, the point again argued, the two foregoing cases were referred to, and the House passed the like resolution.

In the case of Oxfordshire, in 1755, 27 Journ. 285. the counsel for Lord Wenman and Sir James Dashwood, in order to rectify

tify a mistake in an entry on the poll, in the description of the freehold for which a vote had been given for them, " offered to produce one of the check-books kept by their inspector, together with the parole evidence of *several persons* present at the time when the voter was polled. The counsel on the other side objected to the admission of evidence to contradict the sheriff's poll." The point was fully argued, and upon putting the question, " that the counsel be admitted to produce the above evidence to prove that the freehold lay in a different place from that which is entered in the original poll-book, and was in a different occupation, It passed in the negative."

The above authorities are much more than in point to the present question, for the petitions in all of them were upon the *merits* of the election. They shew a long established usage in the proceedings of the House, to give implicit credit to the entries on a sheriff's poll.

It may be said, that the petition referred to the Committee, alledges the return to be
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founded on a palpable mistake of the poll ; but, even admitting the mistake, this is not the *proper time* to inquire into it or correct it. The Committee must, conformably to the usage, give credit to the poll in the first instance : It must be presumed, that the mistake, if it existed, was either not pointed out to the sheriff at all, or not in proper time, or that the sheriff upon inquiry believed his poll to be true. These considerations should determine the Committee to reject the proffered evidence : For the question is not, whether the sheriff did right or wrong in rejecting any inquiry into this supposed mistake, but, whether credit is to be given to his declaration of the poll. In this view, the Committee must consider the question, as if the sheriff had never heard of the mistake till the petition was presented.

It is a rule of law, that a deed or legal instrument is not to be contradicted by parole evidence, and although a poll-book cannot in the language of the law be called a *record*, yet in the proceedings of the House of Commons it is so considered ;
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therefore it is not because the evidence offered may not be credible, but because it is not *competent*, that it is now objected to as inadmissible.

It is a rule of evidence in all courts of justice, to endeavour to prevent perjury as much as possible; but the point contended for by the petitioner counteracts this rule; the admission of the evidence would open a great inlet to perjury. By stat. 7 and 8 Will. III. ch. 25. and 18 Geo. II. ch. 18. f. 7 and 9. (D.) the sheriff is directed to appoint sworn clerks to take the poll, and the parties are allowed to have check-clerks to watch their interests; but the latter are not sworn. If the petitioner should prevail in this point, acts of the sworn clerk will not be more effectual than those of the candidate's clerks, whom it will be lawful at any time to bring forward in order to swear down the poll.

The counsel for the petitioner argued,

That the Committee were bound to receive the evidence offered in support of the petition. The object of it is to get the return amended according to the truth of the
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the fact. It is the duty of the sheriff to return him for whom he has received the majority of votes, and the tendency of this evidence is to shew, that the majority upon the poll, *received by the sheriff*, was for the petitioner.

This question is confined solely to the *return*, and does not interfere with the merits of the election. The distinction between the *return* and *merits*, in cases of this sort, is established by several precedents in the Journals; particularly by the cases of Colchester in 1741. 24 Journ. 98, 99. of Denbighshire *ib.* 90, 91, 92. and of Cumberland in 1768. 32 Journ. 83, 89, 107. in which, the returning officers having returned the members contrary to the numbers which they had received on the poll, the House proceeded upon the question of the return first, and separately, and afterwards directed *that* to be amended, without entering upon the merits of the election, which they reserved for a subsequent petition.

The uniform practice of the House is conformable to these cases: It is founded on a distinction like that well known in
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the law, between *actions possessory*, and actions upon the *mere right*: A man may have the clear right of *possession* of an estate, who notwithstanding has no right to the *property* of it; if he has held an unlawful possession for twenty years, and an ejectment should be brought against him by the lawful owner, he will maintain his ground in this proceeding, though he would be turned out by a higher form of action. Such unlawful possessor, if forcibly turned out by the lawful owner, would still be intitled to recover in a possessory action the possession taken from him, even against the rightful proprietor; because he has the *right of possession*, though another has the right of property. In the same manner, the present petition proceeds upon the claim which the petitioner has to the return, i. e. to the present *possession* of the seat, without entering upon the merits of the election, by which the future *right* to the seat will be determined.

To argue that the petition proceeds upon the merits of the election, is to confound the *election* with the *poll*, and the
poll

poll with the *poll-book*. Polls were taken before writing was common, and before sheriffs could write, and *polling* means no more than the numbering of the voters, whose numbers could not be ascertained upon the view. The point contended for is, that the return is false, because contrary to the real poll. The petitioner does not recur to justice to obtain what ought to have been done, but to obtain the effect of what *is done*. A majority on the poll determines the return, which majority was in this case for the petitioner.

If the Committee should reject the evidence of this fact, they will defeat the end of their institution ; because it is the foundation of the petition, and they are sworn *well and truly to try the matter of it*.

The objection, however, is said to be supported by the established rules of evidence, and by the precedents of the House of Commons. The question is, whether the inquiry is to be stopped, *in limine*, by the testimony of the poll-clerk's book. The objection has the appearance of a *demurrer to evidence*, in which the facts of a case are al-

ways admitted: But if it be admitted that the poll-book is false, will the Committee hear no evidence to contradict it? Yet they must fall into this absurdity upon the principles of this objection. The nature of the petition itself presses strongly against it, for that is framed upon an admission that the book is clearly in favour of the sitting member; if the authority of it is conclusive, the Committee has no jurisdiction. If the poll-book were to have the weight imputed to it by the sitting member's counsel, it would put the return in the power of the sheriff's clerks. But the law does not put such implicit faith in an oath of office: The oath under which a sheriff performs his office is certainly as strong as that of his poll-clerk; yet his acts may be at all times examined into in the courts of law, notwithstanding this sanction. An inquisition of office, formed upon the oaths of a jury, may be traversed by the party who has cause to complain; this too is a judicial record of much higher authority than the writing of a poll-clerk. In the case of the Dutchess of Kingston,
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the recorded judgment of a court of justice was subjected to an examination by evidence, and set aside. The argument that no parole evidence shall be received against a deed, is inapplicable to this case; it is just, that a man should not be allowed to impeach a contract to which he has set his hand and seal; but this rule is personal to the parties. Even supposing the poll-book to have an equal authority with a deed, the petitioner is no party to it, and it cannot so affect him; the judgment in the Dutcheſs of Kingſton's caſe would have been concluſive between the parties, but not in a cauſe ariſing *diverſo intuitu*: Of this nature is the cauſe now before the Committee, in regard to the ſheriff and his official duty, upon the effect of which, third perſons are now diſputing.

It is not denied that the evidence of the poll-book is *primâ facie* valid, but there is a wide difference between that and its being *concluſive*: The legiſlature itſelf has ſhewn a diſtruſt of the poll-clerks, for though the ſtat. 7 & 8 Will. III. ch. 25. ſ. 3. directed the ſheriff to depute perſons

in whose presence they are to act, to swear them to the performance of their duty, and also to allow the parties an inspector of their books, yet the 18 Geo. II. ch. 18. considers this provision as insufficient, and directs check-clerks to be allowed to the candidates. Now, it cannot be supposed that the law allows of check-clerks for no purpose but to inform the candidates, for the inspectors appointed under 7 & 8 W. III. were competent to this purpose before; it must have intended to make use of their books, in order to check and correct the mistakes of the poll-book.

The doctrine of amendments at common law, affords a strong argument in support of the point contended for by the petitioner; the proceedings, which were *ore tenus*, being taken down in writing by the clerk of the court, became thereby the record of the court; yet they might be amended, if the clerk had been mistaken. In modern times the courts of law allow of the same amendments of their records, on receiving proper evidence of an error in them, as in 1 Saund. 249. *Faulkner's case*,

case, in which the court of King's Bench allowed the record of an indictment to be amended in an error in the caption; the same was allowed in *Hocken-bull's* case in Comb. 73. and 3 Mod. 167. and lately in the case of the King and Atkinson in the court of King's Bench, in which all the cases have been considered: So a mistake in a coroner's inquest was allowed to be amended in 1 Sid. 225. In the case of Richards and Brown, Doug. Rep. 109. a record was allowed to be amended even after a writ of error brought. In Doug. Rep. 361. (*Eddowes* and *Hopkins*) the record of the verdict was allowed to be amended according to the judge's notes of the trial.

If the reason of the thing, and the practice of Westminster-hall should incline the Committee to receive the evidence, they will not pay much regard to the cases cited from the Journals. What the law is upon this subject, may be learnt with much more certainty in the decisions of the judges, than in the crude resolutions of the former judicature of elections, whose capricious

opinions the House itself thought it necessary to prevent, by abolishing their own jurisdiction. It is true, the Journals being the only deposit of the proceedings of the House of Commons, must have weight in all questions relating to the *practice* and mode of proceeding there; because, they are the only authorities to resort to, and every court is absolute in its own forms. But where questions of general right, or of the principles of law occur, the resolutions in the Journals have not so much the authority of precedents, because of their uncertainty and contrariety; in these cases their authority extends no further than the reason and justice of them can be vindicated; whereas the decisions of courts of law have an intrinsic merit as precedents. But even if this description were not applicable to the cases in the Journals, those cited for the sitting member do not establish the point contended for; the cases of Rutland and Bedfordshire happened before check-books were allowed; that of Southwark is of a *borough* election, whereas check-books are directed in counties only; —besides,

—besides, that too was before the 18 Geo.

II. Perhaps the best answer that can be given to the Oxfordshire resolution, is, that it is well known, that the whole of that election was disputed with a degree of party violence which did not allow much room for the operation of reason and justice: But if it were not so, instances might be mentioned, where resolutions directly contrary to it have passed in the House. In the Gloucestershire Committee after the general election of 1780, the same question arose, and that Committee received the evidence in contradiction to the poll.

The counsel for the sitting member observed in reply,

That the oath whereby the Committee were bound to try the matter of the petition, did not oblige them to make an inquiry contrary to law, or to receive illegal evidence; that if they should think the petitioner's case tended to this, they would justly fulfil their duty in the trial of the petition, by excluding such an inquiry: That the answer given to their argument was founded in a misconception of it, as

if they had contended that the poll-clerk's book was conclusive in all cases ; whereas it had only been argued to be so in a question of the return, when no particular case is made out to impeach its authority. *Primâ facie* the return is good : What circumstances are alledged to raise a doubt of this? The evidence of the check-clerk. But before the Committee can receive this evidence, they ought to be previously convinced of something wrong on the part of the sheriff with regard to this fact ; as, that the supposed mistake was pointed out to him in proper time,—that the truth of the fact was known to him,—or that the circumstances bound him to inquire into it before the close of the poll. Till the Committee shall be in this manner convinced of the *necessity* of the case, the numbers on the poll are conclusively fixed, according to the return.

The counsel on the other side seem to think they go far in establishing their point, by proving, that there is an allowed distinction between the return and the merits ; but this was unnecessary, because the rule is perfectly well known.

known. But no argument can reduce their case within the terms of it. The cases of Colchester, Denbigh, and Cumberland, in which the distinction contended for is supposed to have been laid down, in circumstances like those of the present election, are all of them essentially different; in all three, the question of the return was altogether extrinsic to any inquiry into the state of the votes upon the poll, and depended upon the sheriff's conduct *after the close* of the poll. They tend rather to illustrate the position first laid down on the part of the sitting member *. Thus, in the case of Colchester, the mayor had received and declared a majority on the poll for the petitioners; and upon some pretence of scrutiny and inquiry into queried votes, in which he proceeded *ex parte*, of his own authority, and without the consent of the petitioners, he afterwards, without assigning a reason, declared the sitting members duly elected. The arguments of the counsel there stated, likewise shew the principle of that decision

* See p. 328.

to have been, as is now contended for on behalf of the sitting member ; the counsel for the petitioners there argued as Mr. St. John's do now, "*That the poll is conclusive evidence*;" and the Committee and the House determined in their favour, whereby they must be understood to have agreed with their arguments *.

The cases of Denbigh and Cumberland are of the same sort ; in both, the poll was garbled by the sheriff, after he had closed it with a majority on the side of the petitioners ; in the first, he was likewise guilty of other flagrant acts of injustice. These facts were quite independent of the entries on the poll, and accordingly the votes on the poll were not inquired into : The whole of those causes consisted in the objections to the conduct of the returning officers, subsequent and collateral to the poll. How different are they from the present question, in which the whole strength of the petitioner's case rests upon an inquiry into the state of a vote in the poll ? No criminal charge is made against the sheriff, and the numbers on the poll

* See 24 Journ. 100.

stand now, as he declared them to the county, at the close of the election.

In this view, the cases cited from the reports do not meet the argument, and might with more propriety be used in a cause upon the merits of the election. Thus it is said, an inquisition of office may be traversed — Why? because the subject can have no other opportunity of contesting the right of the crown; and this is the formal method of trying the merits of the several titles: But in the first instance, the inquisition is good against all claimants, and enables the crown to take possession. The Dutcheſs of Kingston's case depended on the *fraud* of the transaction, and on the principle that all acts are vitiated by fraud; if any fraud were alledged to have been committed in making the present return, it would be a sufficient reason for the Committee's receiving the evidence offered.

The case in 1 Saund. 249, would be to the purpose, if the question were now depending before the sheriff, before the close of the poll; but the effect of the amendment,

ment, there was to *substantiate* the record which the clerk's mistake had made defective, and not to contradict it or annul it; The same may be said of the case of the King and Atkinson; and in Hockenhull's case the error appeared *intrinsically*, and one part of the record was corrected by another, not by any collateral, or foreign evidence. In the case of 1 Sid. 225. the coroner was ordered to amend all *but the verdict*, because that was the declaration of persons on oath; in this therefore the case is adverse to the position it is cited to support: The amendments in the other cases cited were likewise made to effectuate the instruments, not to set them aside.

The principle upon which amendments were formerly made in the courts of common law, was, that the clerk's mistakes might be amended on the spot, and before the proceedings became *records**; after that, it was too late; it is therefore no illustration of the petitioner's argument who contends that *records* may be amended.

* See Black. Comm. b. iii. ch. 25. p. 406.

The counsel for the petitioner imagine that a general censure upon the former resolutions of the House of Commons in election cases, gives considerable aid to their arguments; but, as well in questions of parliamentary law, as of rules of practice, by what other guide are parliamentary proceedings to be governed? If contradictory precedents are cited from the Journals, or if they are contrary to the fundamental rules of justice, they ought not to be followed; but till these defects are pointed out, they must have the weight of authority, and those which have been cited are not subject to this censure. But the observation comes unfavourably from those, who at the same time rely upon precedents in the Journals, in support of their own doctrine *.

After

* After the arguments of counsel were finished, one of the counsel for the petitioner mentioned to the Committee, that a learned judge had from his memory informed him, that in an action against the sheriff of Buckinghamshire for a false return of members for Marlow, tried many years ago before Mr. Justice Denison, in which a Mr. Moore was plaintiff, that judge had

After the Committee had deliberated, the counsel were called in and informed that the Committee had resolved,

“ That the counsel for the petitioner
“ might proceed to call the evidence of-
“ fered.”

The counsel for the petitioner then proceeded in their evidence.

The following relation of the circumstances of the case is deduced from the evidence of both parties, in the manner which seemed to me most likely to elucidate the state of the question. This turned on three points of fact. 1. The general conduct and regulation of the poll. 2. The particular circumstances of Lugden's vote. 3. The means pursued by the petitioner for redress during the election.

I. The election commenced on wednesday the 7th of April, and the poll closed

had admitted the evidence of a check-clerk to contradict the poll.—The particular circumstances of the cause he could not state, for which reason, and because the case was not mentioned in the argument for the petitioner, I have omitted it in the state of this cause.

on saturday the 17th following. The contest was carried on with extraordinary spirit on both sides, and the sheriff, in the latter days of the poll, finding the number of voters diminish considerably, and both parties determined to persevere, resolved to close the poll, if possible, without their consent; for which purpose he frequently made the usual proclamations, the effect of which was as often prevented by the polling of fresh voters. At length, the sheriff having of himself determined finally to conclude the election at some precise time, intimated his resolution to the candidates in the evening of the 16th, and on the 17th in the morning; adding his wish that they would come to some agreement upon the subject among themselves: Hereupon, in the morning of the 17th they agreed to close the poll at six o'clock in the afternoon of that day; and the sheriff then directed a proclamation to be made for this end, a memorandum of which he reduced into writing in the following words, to which all the candidates signed their names.

“ Bedford,

“ Bedford, Saturday, 17 Apr. 1784.

“ By the consent of the candidates, Lord Ossory, Lord Ongley, and Mr. St. John, the sheriff, at the sitting of the court this morning, made proclamation for all freeholders now here present, who have not polled at this election, to tender themselves to vote, and to enter their names by six of the clock this evening; and that no freeholder, who shall not have tendered himself, and entered his name with the sheriff's sworn clerks by that time, can be received to vote at this election. And that the poll will be finally closed as soon as such freeholders, whose names shall have been so entered, shall have been polled.

(Signed) UPPER OSSORY.
 ONGLEY.
 ST. A. ST. JOHN.

Accordingly, at six o'clock the poll was closed, with an adjournment of the county court to monday the 19th, in order to consider the rights of the votes tendered before six and not then accepted for want of time,

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to discuss the votes queried during the poll, and to cast up the numbers. But two of the petitioner's agents swore, that they did not understand the adjournment to have been made with this restriction.

In the first days of the poll there was great confusion in the admission of the voters, but afterwards a degree of regularity was established. Counsel attended for both parties during the whole poll, and it came to be a rule at last, that every point in dispute requiring the sheriff's decision, should be formally mentioned to him by them, or by the candidates themselves. Two or three days before the 17th, it often happened that not more than one voter polled in the course of an hour. It was a rule, that every objection to a voter should be made when he was at the place of polling. When the sheriff finally declared the numbers polled, and the names of the successful candidates, a scrutiny was demanded on the part of the petitioner, and formally refused by the sheriff.

The gentleman who attended the election as counsel to the sheriff, being exam-

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mined before the Committee, said, he considered the poll as finally closed at six on the saturday; and that the adjournment was for the above-mentioned purposes only.

The following circumstances were mentioned on the part of the sitting member, as instances of the rules observed by the sheriff in the conduct of the poll.

One *Boll* came to vote for Lord Offory and Mr. St. John, and was objected to on account of a defect in the assessment of the land-tax respecting his freehold; after hearing both parties, the sheriff being of opinion that he was not properly assessed, rejected his vote. On a subsequent day of the poll, a friend of Lord Offory's produced to the sheriff another duplicate of the land-tax assessment, containing a different description of Boll's freehold, and desired the sheriff then to receive his vote, if he thought him properly assessed: The sheriff (i. e. his counsel) thought the entry in this duplicate proper, and the voter thereby properly assessed, and told Lord Offory so, but said " he could not, consistently with the rules

rules uniformly observed in the poll, revive a question before decided upon hearing the parties," and therefore again rejected the vote. The same gentleman said in his evidence, that he had no doubt of Boll's right to vote, according to the last duplicate of the assessment, and that if this had been shewn him at first, there would have been no question about it. On the 17th the same vote was again brought forward, in order to have his name entered in the poll-book, as a vote tendered, with the names of the candidates for whom he would have voted; but this too was refused, with a recommendation to have it entered in the party's check-book, as the fitter place.

The same gentleman informed the Committee, that during the poll many votes on both sides were rejected, because the sheriff refused to enter upon the questions a second time; and, in particular, on Monday the 19th, the question, "whether it had been considered before," having occurred upon a vote reserved from Saturday, one of the poll-clerks was sent for into the country, in order to ascertain this fact;

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upon his evidence that the vote had been considered before, it was immediately rejected.

II. As to Lugden's vote. — He voted on the first day of the poll: Evidence was given to prove, that the check-books of both parties agreed in entering his vote for Ongley, and not for St. John, as entered by the poll-clerk; that his intentions* before the poll, and after, were in favour of Lord Ongley, on political grounds; that after the poll he said* he had voted for him; that the mistake of the clerk was discovered two days after by Lord Ongley's friends, and that Mr. St. John's check-book was refused to their request of inspecting it. The voter himself was not called as a witness, but the counsel for the petitioner said, he was attending, that the sitting member's counsel might examine him if they thought proper; that

* The counsel for the petitioner, when they produced this evidence, said, they were sensible that this sort of evidence was liable to suspicions, and ought to be received with great caution; but that they hoped they had laid a proper ground for the admission of it, by the attendant circumstances.

they

they had reasons for thinking it improper evidence on their part.

III. As to the means pursued for rectifying the mistake. Witnesses proved, that when the mistake was discovered by the petitioner's agent, a memorandum of it was made in his check-book; that the poll-clerk was informed of it in a general conversation, or rather altercation, in one of the booths, in which somebody present proposed a reference to the sheriff on the subject, the clerk himself being willing to have made his book agree with both the check-books. Lord Ongley applied, during the poll, for leave to inspect the poll-book of this hundred for a particular purpose, (not naming it) which was refused by the sheriff. An agent of Lord Ongley's swore that he avoided bringing the case forward during the poll, that he might not interrupt the other business, but that he believed he mentioned it to the sheriff's counsel (who for these purposes was considered as the sheriff) on the friday or saturday, as a matter intended to be brought forward for his consideration. On the monday, the

voter having been sent for, came to Bedford, and he and other witnesses to substantiate his vote, were there in readiness to give evidence to the sheriff for that purpose.

On monday the parties met at the shire-hall, and went through the business of the votes adjourned over from saturday, and those queried; this lasted till near three o'clock, and then they agreed to retire in a small party of chosen friends of each candidate, into the grand jury chamber in order to cast up the poll. This was the period about which there was a direct contradiction in the evidence. The counsel to the sheriff swore positively, not only that the matter was not mentioned to him before, but also that the first intimation he received of the mistake in question, was on this monday after they had left the Shire-hall; when every thing was concluded but the summing up of the members, and when they were going to enter upon that business in the grand jury chamber, the parties being assembled there and seated at a table for the purpose. On the outside of the door of this room, this mistake was mentioned

tioned to him by Lord Ongley's agent, who pressed him strongly to correct the mistake, and offered the evidence to convince him of it: He answered, that the application was made too late, that the sheriff had no power to enter into the question or to revise the poll, after having closed it; and concluded that it could not be done. While they were in this conversation, they were joined by another agent of Lord Ongley's who supported the former in his application. This conversation soon ending, by the declaration of the sheriff's counsel's opinion, he retired into the grand-jury room and mentioned what had passed: the sitting member's counsel expressed his approbation of the opinion given, the petitioner's counsel did not oppose it; and the conversation still continuing upon the subject between him (the sheriff's counsel) and the petitioner's agent, a friend of the sitting member's said warmly "Mr. Sheriff, if you are to go into that, I must desire you to hear us, as to several mistakes of the same sort against us." About the same time the conversation upon this mistake

dropped, and they entered upon the other business.

Lord Ongley's agent swore positively (besides the previous notice above stated) that he mentioned this matter to the sheriff's counsel *in the Shire-hall* before they adjourned to the jury-chamber, and that he had the witnesses and the voter himself there ready for examination; another agent in the same interest swore, that at the time alluded to by the other, after talking with him upon their design to get Lugden's vote corrected, he saw him go up and speak to the sheriff's counsel in the Shire-hall, but was at too great a distance to hear what either of them said.

There was likewise a contrariety in the evidence of the time of the day when Lord Ongley's agent made this application to the sheriff, which left it doubtful whether it was between two and three o'clock, or about four. This related to the point of time in which the parties were said to have retired into the jury-chamber.

Upon these facts, the counsel for the petitioner contended,

That

That the error of the poll-book was plainly proved; that the application to correct it was made in proper time; and that the sheriff ought to have received the evidence offered to him and to have corrected the error; consequently, that the Committee would now do the same. They argued in the following manner,

The question for the decision of the Committee involves a mixture of fact and law: The questions of fact are, whether Lugden's vote was falsely entered in the book, and whether the sheriff had due notice of the mistake. As to the first, it is proved that Lugden intended to vote for the petitioner; that his inclinations led him to that side, from political or party motives of favour to the particular candidate; that after polling, his sentiments were the same, and that he believed he had served his party by his vote. That he did actually declare his voice for the petitioner, is proved by the concurrent testimony of the two opposite check-books, and by the petitioner's check-clerk who remembered the fact. If the matter were at all doubtful, the suspicious

cious refusal of an inspection of the sitting member's check-book, would be sufficient to turn the scale.

As to the second point, the memorandum made of the mistake at the time shews a formed design to rectify it, although it could not then be known that it would be so material to the party: It is fair to presume that Lord Ongley's desire to inspect the poll-book, had the same object in view. The poll-clerk, who is the sheriff's deputy, had notice of his mistake two days after it happened; he ought in duty to have mentioned it to his principal, and this notice to the deputy was, in point of law, a notice to the principal; at least for the object of the present cause, it may be so considered. Thus, notice of the mistake was given early in the poll, though the request to alter it came late: this may be easily accounted for from the hurry of the election, and the necessity of more important business which it would have interrupted.

“Judicis officium est, ut res, ita *tempora rerum*
Quærere ———.”

But

But an objection to the *time* of the application cannot be urged by the counsel on the other side, consistently with their position 'that the poll-book is conclusive evidence;' if so, every day during the election was equally proper or improper, and every application would have received the same answer from them; because the authority of that book would have been as binding on the day after the mistake, as at the end of the poll, and would have been used accordingly for their defence.

When the Committee consider the several steps taken on the part of the petitioner, to prevent the operation of this mistake against him, they will see good reason to presume in his favour, upon those points in which there is a contrariety in the evidence. Besides the circumstances already mentioned, the voter was sent for to Bedford on monday, and attended at the Shire-hall with other witnesses: Can it be doubted for what purpose he attended? The petitioner's agent was determined to bring forward the question, and actually did set about it while the parties were in the hall:

Is

Is it probable that the end would not be pursued when the means were prepared? Then, the manner of rejecting the application shews, that the opinion was founded more on the authority of the poll, than the supposed impropriety of the time.

If it should be urged, that by the petitioner's consent to the minute of the proclamation for closing the poll, he is *estopped* to bring this question forward, it might be answered, that the words of this minute will not bear such a construction. It only provides that *no freeholder should be received* after the time limited, and declares the conclusion of the poll to be future and uncertain, "— the poll *will be* finally closed, as soon, &c*." So that in the most unfavourable sense of the proclamation, the poll could not be considered as *closed*, when the application was made.

The question of law is not difficult to determine; for if a mistake of this sort existed, and was mentioned in proper time to the sheriff, he was bound to have corrected

* See p. 352.

it, because by so doing only, could he make a return according to the true number of votes received by him. There is a wide difference between correcting the entry of a vote *admitted* or *rejected* on a disputed title, and that of a vote whose right was allowed; in the former instance the sheriff acts *judicially* and his judgment is conclusive as to the return; but in the latter, he acts *ministerially*, his duty is to state the fact truly and to give effect to it. If he does not, his return is in this respect false, and the alteration of this mistake is the only way to make the return agree with the election.

The Committee should consider themselves upon this question, as sitting to do what the sheriff ought to have done at the election, when the application was made to him. If, therefore, he had then made the inquiry suggested to him, he must have seen his error and corrected it; the effect of it would have been, a return of the petitioner, instead of the sitting member. Upon that principle of equity, that what ought to have

have been done is to be considered as done, the Committee will now decide in the same manner. In the case of Derby *, a question arose upon the right of a set of persons claiming to be admitted freemen before the election ; they were refused admission, and afterwards at the election their votes were refused for want of this admission : But the Committee who tried the cause, being of opinion, that they ought to have been admitted to their freedom before the election, whereby they would have acquired a compleat right to vote at that election, resolved to allow their votes accordingly, and Mr. Coke the petitioner succeeded by that resolution.

The counsel for the sitting member argued as following.

The evidence of the mistake is not such, and so clearly proved, as to intitle the counsel for the petitioner to argue from it as a fact established : The poll-clerk and check-clerks, still rely more upon the authority of their books, than upon any other means

* 3 Doug. Elect. 366, &c.

of information ; the former is sworn, the others not ; and it is well known that in all elections, the poll-clerk is more exact than the others, who often copy one from another. Notwithstanding the known intention and declaration of the voter, it is still fair to suppose that in the confusion in which his vote was given, he may have made a *lapsus linguæ*, which occasioned the entry as it stands ; such circumstances have often happened, and it appears that the disorder at the poll was so great on the first day of the election, that a man of good understanding might easily have forgot himself in such a scene. The peculiar state of this cause would warrant the Committee in making this supposition in a doubtful case, in order to support a public officer in an act of duty.

But supposing the Committee to be persuaded of the mistake as contended for, there are many reasons which should induce them to support the present return. These result from a consideration of the general tenor of the election, and from the petitioner's conduct upon this subject.

The

The question has been fairly stated as depending on the time, and manner, in which the subject was mentioned to the sheriff; and it is agreed on both sides, that the Committee ought to consider the question as the sheriff should have done. As to the time, according to the evidence of the sheriff's counsel, who from his situation must be supposed impartial, the mistake was never suggested to him till the monday. On the other side it has been contended, (in order to obviate the effect of this evidence) that the sheriff had notice of the mistake two days after it was committed, because it was notified to his deputy the poll-clerk: But if the notice alluded to had been a formal notification of the fact, it would not have warranted such a conclusion from it; because the election was conducted throughout on different principles, and because it was not done in order to obtain an amendment of the error by such notice. The only effectual notice is that which was given in order to cure the defect, and pursued accordingly. In fact, the supposed notice was only a *conversation* among
persons

persons not authorised by the parties for the purpose, and without any view of prosecuting it, at a place where the poll-clerk happened to be present.

The reasons now offered for not bringing on the question sooner, are insufficient and contradictory; although the party had knowledge of the mistake, it does not appear that any resolution was taken to correct it during the poll. They would now have the Committee infer that they had determined upon an application to the sheriff, and designedly postponed it; but the memorandum relied upon for this, is no more than a note or index (of which, no doubt, there are many on both sides) for future use upon a scrutiny, which was talked of during the poll, and afterwards demanded. It cannot be believed that in the latter days of the poll they were afraid to interrupt more urgent business, because in those days there were many vacant hours, and sometimes twenty votes was the amount of a day's poll. It was never mentioned to the opposite party, either as a subject of conversation or of business.

B b

These

These circumstances induce a belief, that this application was a shift in the last resort, when they were hard pressed at the end of the election; the importance of it could not till then be known, nor were the witnesses or the voter till then sent for: Or if it was really intended to make use of the vote, the fact was purposely kept secret, till it would be too late for the other party to have advantages of the same sort.

The Committee, in determining upon the sheriff's decision, should be guided by these considerations. 1. Whether he could have made the alteration asked for, consistently with his former conduct in the regulation of the poll. 2. Whether he could in law revise an entry on the poll, after it was *closed*. Upon the first question, Mr. St. John contends, that the proper time for making the alteration, was when the voter was present: Without relying upon the practice of this election, this is warranted by the statutes*, whereby the parties are allowed to have inspectors and

* 7 & 8 W. III. ch. 25. and 18 Geo. II. ch. 18.

check-clerks: The statutes seem to have in view by this provision, the prevention of the very difficulty that now occurs. It is the duty of these party agents to watch the errors of the poll, and to inform their principals; if they neglect it, the latter ought to be concluded by their negligence. If it were not so, to what endless distraction might not the sheriff be subjected? Such mistakes happen in the course of every day's poll; before the end of the day, the persons acquainted with the transaction may have left the town, and the sheriff has no power to compel their return: It is therefore right, upon this account, that there should be a limitation to the time of discussing such questions. In another point of view it is equally just, for a contrary practice would give great encouragement to the knavery of party tools, who abound in these contests.

The manner in which the application was made to the sheriff, (exclusive of the time) was not conformable to the regulations observed in the poll. It was brought forward irregularly, by an agent, and not

by the petitioner's counsel ; and when mentioned in the counsel's presence, was not taken up by him as a subject of argument. From this, the sheriff might well infer, that the case was not deliberately brought forward, as a serious proposal for his decision, but rather as an instance of hardship to be regretted.

Upon the second question, much depends on the time in which the poll may be said to have been *closed*. It is contended for the sitting member, that this time was when no more votes could be received, viz. at six o'clock on saturday. The *poll* is the numbring of the electors according to their voices ; in this sense, therefore, the poll is concluded, when all those who may give their voices are received. If the counsel for the petitioner say that the poll was open on monday, for any other purposes than those reserved for that day, they must at the same time admit that it was open for *every* purpose, without distinction, and that new votes could have been received at the time when this application was made. This position would lead to great absurdities, and

is not only contrary to the general law and practice of elections, but likewise to the very terms under which the candidates themselves consented to the adjournment of the county-court; the *poll* was thereby closed, the *court* was adjourned for the purposes mentioned. The discussing of the unaccepted votes was in substance the same business with that of those queried, for their names were received, but their rights were undetermined. It may therefore be said, that the only business of monday was to examine into the queries on the poll, and to cast up the numbers;—a business which perhaps never yet took place in any election, till after the poll was understood to be closed.

If the Committee should be of this opinion, the question upon the *time* of the application, and the contrariety of the evidence, will not be material. The petitioner's counsel seem to rely principally upon the application made on monday, and to be sure they cannot seriously urge any other; whether this took place in the Shire-hall, or at the door of the jury-chamber,

chamber, it was in either case too late. This, at least, is clear, that it was not till late in the day, when almost all the other business was finished. But if the Committee should think the point of time a material subject of inquiry, they ought in justice to give more credit to the evidence of an indifferent person, acting in a station of some professional responsibility, than to that of an agent of one of the parties eager in the pursuit of his object.

Under these circumstances the sheriff was justified in refusing to enter upon a question, which must have tended to open the whole election in the period of its conclusion. He must, in the course of equal justice, have attended to the like application at that time threatened from the sitting member; this would have led to others, those again, to new discoveries, and thus the parties, without intending it, would have found themselves in the midst of a scrutiny. What is the use of a scrutiny but to correct the errors of a poll? A scrutiny was the proper, and the only lawful method for correcting such errors, if they existed.

existed. It has been said, that the sitting member's case is founded upon perverting the distinctions between a poll and a poll-book; but it may with better reason be said, that the argument of the petitioner's case confounds a poll with a scrutiny.

The Committee having deliberated, informed the counsel that they had passed the two following resolutions :

1. " That the application to the sheriff was such, and made in such time as to call upon him to attend to it."
2. " That the sheriff ought to have taken the vote of William Lugden from the poll of Mr. St. John, and added it to the poll of Lord Ongley."

In the former part of the cause, when the counsel for the petitioner had finished their evidence relating to the case of Lugden, they informed the Committee, that with respect to the other two votes mentioned in the petition, (the circumstances of which they had before mentioned in the opening) they could not produce evidence

that application was made to the sheriff to correct these mistakes, before the close of the poll; that if the Committee should think proper, they were prepared to prove the mistakes of the poll-clerk, as stated in the petition. Hereupon the chairman asked the counsel for the sitting member if they chose to offer any argument on this point; to which they answered, that the matter rested with the Committee. The court was then cleared, and the Committee deliberated. When they met next morning, the counsel were informed that the following resolution

“ That the counsel be admitted to produce evidence to correct mistakes upon the poll-book, although no such evidence was tendered to the sheriff”
had passed in the negative.——

This resolution passed before the counsel for the sitting member had opened their case in answer. Its effect confined the case on the part of the petitioner to the vote of Lugden only. On the other side, they expressed a wish that the Committee would
allow

allow them to proceed, first and separately, upon that part of the sitting member's case which related to this vote, that according to the judgment given upon that point, they might or might not enter upon the other points they intended to bring forward; but this was opposed by the other counsel, and not approved by the Committee, who desired them to open their whole case, and proceed upon it altogether, as the whole evidence for the petitioner was now closed.

The counsel for the sitting member did proceed accordingly in their case, and stated that they should prove that four (in which they afterwards corrected themselves and mentioned six) votes had been falsely entered on the poll, by mistake, to their prejudice, in the same manner as that of Lugden for Lord Ongley.

After the abovementioned resolutions relating to Lugden were communicated to the bar, the counsel for the sitting member proceeded, in support of their case, to call evidence to shew, that one Thomas Eyre whose name was entered by the clerk as
voting

voting for Lord Offory *only*, had voted for St. John likewise.

This evidence was objected to by the counsel on the other side, who said, the last-mentioned resolution of the Committee imported that it ought first to be made appear, that the case had been mentioned to the sheriff during the poll.

The counsel for the sitting member said, they could not prove that notice of the mistake had been given to the sheriff, but they contended,

That they had a right, notwithstanding, to enter upon this case now; that the resolution alluded to was formed by the Committee *ex parte*, upon the case of the petitioner only, occasioned by a request from his counsel for the Committee's directions, as to their own mode of proceeding; without hearing them, and without any intimation from the Committee that any resolution was in contemplation which would be binding upon the sitting member. He would, indeed, be in a strange situation, if he should not be allowed the same means
for

for his defence as had been employed against him.

In the former argument the opinion of the House had been pressed upon them, and therefore they reminded the Committee, that when St. John's petition had been presented to the House, it was rejected there upon the ground that he would have the benefit of it before the Committee, as a matter of course; They said it was agreed, That the committee were to decide as the sheriff ought to have done; and if he had thought himself competent to receive the application made by the petitioner, the sitting member might have had an opportunity of bringing forward similar cases for his consideration; but having done otherwise, it would have been absurd for the sitting member to have offered any evidence to him of a mistake, at the same time that he denied his authority to correct it; or to have produced witnesses, who, as he contended, ought not to be heard; and it was useless when the majority was declared to be in his favour; That the Committee must in justice presume, that Mr. St. John

knew the circumstances of his case and would have done what his situation would have required of him, if the sheriff had decided the contrary to what he did; and therefore they would not interpret their resolution so as to deprive him now of a defence, which he could not and ought not to have made before.

The counsel for the petitioner said,

That all they contended for was an equal measure of justice, that one party might not have an advantage which had been refused to the other; That it was inconsistent in those who admitted that the Committee were to do what the sheriff ought to have done, to press them to receive evidence which they did not offer to the sheriff: The Committee had decided what the sheriff ought to have done, and that judgment ought not to be impeached; *now* the question is, what the *party* ought to have done; — Having neglected to proffer the evidence to the sheriff, he is precluded from doing it now by the resolution of the court, which certainly has in terms a reference to
both

both parties ; That it could not be said to have been made, without hearing the counsel for the sitting member, because they had been formally asked, whether they desired to speak upon the question, and declined it ; nor was there any peculiar hardship falling upon the sitting member, in being restrained from going into the merits of the cause (which this case led to) upon a question of the return only. As to the arguments which are said to have been used in the House, they could not anticipate the judgment of the Committee upon their own method of proceeding ; but Mr. St. John's petition had been rejected * there, conformably to the rules of the House, which never receives petitions from sitting members on their own elections.

When the Committee met on the day following, the counsel were informed that the following resolution

“ That the counsel be admitted to
 “ produce evidence relative to Thomas
 “ Eyre.”

had been negatived.

* It was withdrawn, not rejected, See p. 326.

Here-

Hereupon the counsel for the sitting member proposed to enter upon the evidence of a mistake in the poll-book, which they said was not within the restrictions laid down by the Committee. This was the case of one Edward Bennet, who had voted for *Ossory* and *St. John*; but in the poll-book his vote was entered for *Ossory* only. The gentleman who spoke the words stated in p. 359. to the sheriff, when the case of Lugden was pressed upon him in the grand-jury chamber, had this mistake particularly in view at the time when he spoke. He had heard of other mistakes of the same sort, but at that time knew the circumstances only of this.

The counsel said, that as the sitting member would certainly have offered evidence of this mistake to the sheriff, if he had inquired into the other, they now claimed a right, consistent with the rule of the Committee, to produce such evidence to them, in order to obtain the necessary correction of the poll. They admitted that both the check-books agreed with the poll upon this vote.

The

The counsel for the petitioner objected to any inquiry into this supposed mistake, alledging, That as all the entries of the vote agreed, no regular evidence of their error could be produced, in this stage of the cause; That the statute allows inspectors and check-clerks for the purpose of rectifying mistakes in the poll, and therefore the mistakes, if any, ought to appear by a comparison with the check-books.

To this it was replied, That the objection was premature, as it was founded in a conclusion from the effect of the evidence, (of which alone the Committee were to judge when it should be heard) and not to the evidence itself, the materials of which had not been stated: That the question now was, whether the case should be considered, of which there could be little doubt after the alteration of Lugsden's vote;—As to the proofs, none had yet been offered.

The Committee, after deliberating on the question, Resolved,

“ That

“ That the counsel be admitted to produce evidence relative to Bennet’s vote.”

The first witness called was the voter himself. He was objected to by the counsel for the petitioner, who argued, that his testimony was not competent.

First, On account of interest, for although the voter has no such pecuniary interest as is the cause of incompetency in other courts of justice, yet every voter is supposed to be interested in the support of the party he espouses; it has been often said by Lord Mansfield, that questions of evidence always depend on the subject matter to which it is applied; such an objection as this could not arise in Westminster-hall, because it is peculiar to the complicated nature of an election petition, in which alone the consequences of establishing the vote, can be considered as interesting to the voter.

Secondly, The practice is uniformly in favour of the objection; The Journals do not furnish a single instance of a voter’s being received as a witness in the circumstances in which Bennet stands; nor can any case
to

to the contrary be produced since the institution of the new judicature: Now, uniform practice is the best evidence of the law. It is usual at elections for a voter, whom the sheriff may have rejected, to make a formal tender of his vote; but when the case comes before a Committee, the voter is never produced to prove that tender, but some indifferent person; the reason of this may be learned from the rules that guide the other courts of justice. Lord Hardwicke said, that where there was a great danger of perjury, if the interest of the witness were probable, it would always lead him to allow the objection to his evidence*. Supposing in this case, Bennet were in his examination to speak falsely, it would be almost impossible to convict him of perjury, because in defence of the indictment it would be urged, that if he is admissible here, the evidence of the poll and check-books united is not conclusive:

* Perhaps the words alluded to are those mentioned in the law of *Nisi Prius*, p. 286. "— Unless the objection appeared to carry a strong danger of perjury, and some *apparent* advantage might accrue to the witness, he was always inclined to let it go to the *credit* only."

The great value of this man's vote to the sitting member, shews what advantage his evidence might procure to him; here is therefore a temptation to perjury.

Thirdly, The inference to be drawn from the statutes of elections, affords a strong argument against this evidence, which, it is said, is to contradict the entries in all the three books. The Legislature, by allowing check-books to the parties, must mean not only a benefit to them, but also to introduce regularity into the poll, and that in cases of doubt they are not only to rely on the minutes of their own clerks, but likewise to be bound by them.

The statute 2 Geo. II. ch. 24. provides very strictly against bribery, and the provision is enforced by an oath; but it might be easily evaded by the opportunity which the admission of this evidence would give: Corrupt the voter after the election to retract his vote, and no penalty will be incurred.

In all the cases of *amendments* at law, it is a general principle, that the amendment of a written instrument, should be made from some other written instrument

ment of equal authority ; thus, Lugden's poll was amended on the authority of the check-books ; but in this case, these confirm the present state of the poll.

Besides the above arguments there is a strong one *ab inconvenienti*. In a petition on the merits the inconvenience of receiving such evidence would be monstrous ; it would open every vote on the poll to a fresh inquiry, which in places of popular election would render the duty of a Committee almost impracticable.

These arguments the counsel for the sitting member answered as follows :

The ground of interest alledged for rejecting this evidence is trifling, and not founded on any principle in law, or any case in the reports : Whatever suspicion it might raise of the witness's credit, it can found no objection to his competency. The true test of such an interest is the question mentioned by Lord Hardwicke *, " Is he to get or lose by the event ? " The voter may have no further concern in the event, than a

* In the case of the King and Bray, Hardw. Rep. 359.

hundred others who only read of it in the public papers.

Where a right of voting is in question, a voter is not allowed to give evidence; but this arises from a just exception to his interest, resulting from the loss or gain of a personal right; and each vote constitutes a cause as to the individual voter, in which he is a party. The present inquiry has nothing to do with the right of voting, and the vote of Bennet himself is absolutely fixed on the poll, his right being unquestioned.

The counsel on the other side could cite no cases in their favour; but there are two strongly in point against their argument, which have been solemnly determined in the King's Bench. One is the case of Mountain and Adkin, where the question at the trial was, whether the plaintiff or defendant had been duly elected to a curacy in Norwich: The defendant contended, that according to the agreement of the parties before the election, the right of voting, for that time, was to be allowed to *residents* only, and that of these he had a majority.

majority. In order to prove this agreement, he called witnesses who were resident electors, and the other side objected to their competency on account of interest: But the judges held, that as the question arose not on the right of voting, but on the *agreement*, and that being *pro hac vice* only, and the election being over, they were competent witnesses, having no interest as to such past election. Lord Mansfield, in giving his opinion, observed, that the rule of evidence with respect to competency, is generally carried too far, and said, he was inclined to follow the practice of Lord Hardwicke, who in doubtful cases used to restrain the objection to the *credit* only (E).

The other case is that of the King and Bray *, which was cited and relied upon in the argument of the above case; There the issue was upon the custom of electing the mayor of Tintagel, which was said to be thus: The former mayor and town-clerk choose each an elisor, which two elisors summon a jury, who elect the new

* Hardw. Rep. 358. and Buller's *Nisi Prius* (edit. 1772) 286. (last edit.) 290.

mayor; to prove this custom one of the two elisors was called, and objected to as incompetent, on account of his interest to support his own authority. But the judges held, that as his authority was past, it was no ground of objection to his competency (F).

These cases go further than it is necessary to contend in the present argument, and the Committee, who in this case are to decide a point of general law, ought to pay great respect to decisions made on such authority.

As to the practice alledged from the Journals, it should be remembered that the mode of examination is different in this court, from that which formerly prevailed in the House of Commons, from whence the practice is cited: There witnesses were not examined on oath, and it would have been unreasonable to have allowed such evidence to be given, in contradiction to that which was upon oath; but when the witnesses speak upon oath, that reason exists no longer. The other part of the argument, drawn from the danger of perjury, and

and prospect of advantage, proves too much; it would go to prevent any other voter at the election from being examined on this subject, for to all of them the same objection holds in an equal degree. A witness was never yet rejected, from an imagined difficulty in convicting him of perjury if he should speak false; where any such circumstances appear, it may perhaps raise an objection to his credit, but no further.

The conclusion attempted to be drawn from the statute 18 Geo. II. ch. 18. is merely speculative; it is more consonant to the general provisions of that statute, considering the mischief it was intended to prevent, to suppose that the use of check-books is to controll the sheriff, or his deputies, without any particular view to the contingent disputes of the parties. The argument upon the bribery act, is not only as applicable to every other voter as to Bennet, but it is denied to be a just notion of the law; it certainly is *bribery* at common law, and punishable by fine and im-

prisonment, to corrupt a voter after an election for the purpose described.

The supposed inconvenience of admitting this evidence, cannot, with any propriety, be urged against the fitting member, who resisted this sort of inquiry, before it was authorised by his judges, and brought into use by his opponent.

The Committee having deliberated on the question, Resolved,

“ That the evidence of Edward Bennett be not admitted.”

After the chairman had communicated this resolution to the parties, the fitting member's counsel proposed to call evidence to prove the case of Lavender Boll, in order to prevail upon the Committee to add his vote to their poll. The circumstances of it had been related in the former part of the cause, as part of the fitting member's evidence upon Lugden's vote*.

* See p. 354.

The counsel for the petitioner objected to any inquiry into this case; They said, it could not be done without confounding the distinction between the *merits* and the *return*, for that it related to the merits of the election; That the sheriff, as returning officer, exercises both a judicial and a ministerial function*; in the former character, he determines upon the rights of the electors, in the latter he receives their votes and returns the writs; this ministerial conduct therefore, may be, and generally is connected with the return only; but to revise any part of his judicial capacity, is to enter into the merits. The return may be good,

* Judge Blackstone gives the following description of the sheriff's power and duty, "These are, either as
 " a *judge*, as the keeper of the King's peace, as a *ministerial officer of the superior courts* of justice, or as
 " the King's bailiff.

" In his *judicial* capacity he is to hear and determine
 " all causes of 40s. value in his county-court;—He is
 " likewise to *decide* the elections of knights of the
 " shire,——of coroners, and of verderors; to judge
 " of the qualification of voters, and to return such as
 " he shall *determine* to be duly elected.

" As the keeper of the King's peace, &c." See
 1 Comm. 343.

although

although he was palpably wrong in judgment upon the questions before him; but a failure in his ministerial duty generally occasions a bad return. Thus in Lugden's case, the sheriff had nothing to do but to enter an elector's vote, which having not done, and when informed of his error, still refusing, the Committee amended it; because the return could not correspond with the election while this mistake stood. But in the present case the return may correspond with the election, because no vote was admitted. Perhaps the sheriff may have erred in his judgment, but still, he having jurisdiction, his decision is binding as to the return, which is his own act; whereas in Lugden's case, the Committee have determined that he had no authority knowingly to enter a vote for one candidate, that was given for another, because he thereby occasions a false return.

That even if the Committee were not to follow this distinction, they would see good reason to approve the sheriff's decision upon the question before him, according to the principles which are established in granting
new

new trials in Westminster-hall ; That the case before the sheriff resembled an application for a new trial in order to admit fresh evidence, which the judges never allow, unless it appears that the party could not have obtained such additional evidence on the former trial : That if an application were to be made in the King's Bench on the ground now laid before the Committee, it would be refused, because the new evidence existed and was forth-coming at the first trial, if the party had used due diligence to obtain it ; the parties were intitled to inspect and have copies of the land-tax assessments, and Mr. St. John might have produced the right duplicate when the vote first became the subject of inquiry before the sheriff.

The counsel for the sitting member contended,

That it was impossible to distinguish this case from that of Lugsden ; that the resolutions upon that vote directly contradict the position of the opposite counsel, *that questions on the return must be independent of*
3
the

the exercise of the sheriff's judicial authority; in that case the sheriff exercised a judicial authority; as to which it signifies little, according to the petitioner's counsel's own distinction, whether it be employed upon the *right* or the *fact* of voting; in Boll's case he did the same: It was an error of judgment in each, according to the former resolutions of the Committee. The sheriff having acted in both cases by the same rule, it necessarily follows, that if one may be reviewed now, the other may likewise, because it is now determined that his rule was wrong. If such review should lead into the merits of the election, the counsel for the petitioner may thank themselves for it, as their example taught the way to such inquiries; but certainly Boll's case goes no further than Lugden's. The vote of the former was refused though the sheriff had no doubt of his right, because he was thought to have come too late; that of the latter being falsely entered, was so continued, because he too was thought to have applied too late. If the sheriff had no authority to refuse the application for Lugden,

den, the rejecting Boll was equally without authority, and the return made in consequence, must be equally defective, because contrary to the number of votes whose right was not doubted.

The case put of a motion for a new trial does not meet the argument for the sitting member, which is, that the *trial* (if it may be so called) of Boll's vote was continued during the whole poll, according to Lugden's case, and therefore the new evidence was tendered in time and before the final determination; for which reason it ought to be received now.

The Committee resolved,

“ That the case of Boll refers to the
“ merits and not to the return.”

The counsel for the sitting member, upon being informed of this resolution said, that the case of *Harrison*, which they had likewise intended to bring forward, and the others, were under the same circumstances as that of Boll, and therefore they
would

would give the Committee no further trouble.

The court was then cleared, and the Committee after deliberation determined,

" That the sitting member was not duly returned, and, That the petitioner ought to have been returned.*

Which resolutions the chairman reported to the House on the same day (1 July).

The return was amended in the House on the next day, after which, the order usual in such cases, was made, viz.

" That the honourable St. Andrew St. John, and the freeholders of the county of Bedford, be at liberty to petition this House to question the election of the right honourable Robert Henley Ongley, Lord Ongley in the kingdom of Ireland, within fourteen days next, if they think fit†."

Mr. St. John presented a petition accordingly on the seventh of July ‡, which

* Votes, 1 July, p. 329.
p. 351.

† Votes, 2 July,

‡ Votes, p. 378.

was ordered to be taken into consideration October 12; being the day which had been before appointed for considering that of the freeholders, who in the beginning of the session petitioned against the election of Mr. St. John.

The appointment of a day for this petition occasioned a debate in the House. A resolution had passed on the 21st of June, to try no more election petitions in the session, after the hearing of that from Hereford*: This period expired on the same day in which the Bedfordshire return was amended, and leave was given to Mr. St. John to petition.

The debate was occasioned by a motion to take his petition into consideration on the 22d of July, several members contending, that the peculiar hardship of his case, intitled him to have his petition heard in the course of the session. On the other side, the foregoing resolution was held forth as conclusive against the motion: To which it was replied, that this resolu-

* Votes, p. 262.

tion related only to the petitions then depending, and could not operate upon those which might arise from events subsequent to the time of passing it; upon which the House must necessarily exercise its discretion according to circumstances: But the debate concluded, by referring the petition to the day above-mentioned.

NOTES

N O T E S

ON THE CASE OF

BEDFORDSHIRE.

PAGE 324. (A). This resolution, as set forth in the votes of this day, is as follows: "Several petitions, complaining of undue elections and returns, being offered to be presented to the house,"

" Resolved,

" That whenever several petitions, complaining of
 " undue elections or returns of members to serve in
 " Parliament, shall at the same time be offered to be
 " presented to the House, Mr. Speaker shall direct
 " such petitions to be all of them delivered in at the table
 " where they shall be classed and read in the following
 " order, viz. Such petitions as complain of double
 " returns in the first class; Such as complain of the
 " election or return of members returned to serve for
 " two or more places, in the second class; Such as
 " complain of returns only in the third class; And
 " the residue of the said petitions, in the fourth class :
 " And the names of the places to which such petitions
 " (contained in the first class, if more than one) shall
 " relate, shall, in the first place, be written on several
 " pieces of paper of an equal size, and the same pieces
 " of paper shall be then rolled up, and put by the clerk

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“ into a box or glass, and then publicly drawn by the
 “ clerk; and the said petitions shall be read in the or-
 “ der in which the said names shall be drawn: And
 “ then the like method shall be observed with respect
 “ to the several petitions contained in the second, third,
 “ and fourth classes respectively.”

The first session in which the statute 10 Geo. III. ch. 16. (called Grenville's bill) took place, was that which began Nov. 13, 1770; but there being few elections, and still fewer contests, occasioned by the accidental vacancies during a Parliament, the necessity of some regulation of election petitions, did not occur till after the general election next following: But in the first session of the new Parliament called in 1774, it soon appeared necessary, and was recommended by the Speaker to the House, in order to avoid the confusion which the great number of petitions would have created in their proceedings. Accordingly, on the first day of petitions in this session (6 Dec. 1774) after several had been read, the following entry appears in the Journal*:

“ And several other petitions, complaining of un-
 “ due elections and returns, being offered to be pre-
 “ sented to the House at the same time; and Mr.
 “ Speaker having recommended to the House, to con-
 “ sider what was fit to be done upon that and similar
 “ occasions, and to establish some proper order relative
 “ to the *method of delivering* in the said petitions,

“ Resolved,

“ That whenever more than one petition, complain-
 “ ing of an undue election for the same, or for diffe-
 “ rent places, shall at the same time be offered to be
 “ presented to the House, Mr. Speaker shall direct

* 35 Journ. 16.

“ such

“ such petitions to be all of them delivered in at the
 “ table; And the names of the counties, cities, bo-
 “ roughs, or places to which such petitions shall re-
 “ late, shall be written on several pieces of paper of an
 “ equal size, and the same pieces of paper shall be
 “ then rolled up, and put by the clerk into a glass or
 “ box; and then publicly drawn by the clerk; and the
 “ said several petitions shall be read in the order in
 “ which the said names shall be drawn respectively.”

This order was directed to be followed in the next
 session, with respect to *renewed* petitions*. In the be-
 ginning of the new Parliament called in 1780, it re-
 ceived a new form: The entry in the Journal † of the
 7th of November is as follows:

“ Several petitions, complaining of undue elections
 “ and returns, being offered to be presented to the
 “ House,

“ Resolved *Nemine contradicente*,

“ That whenever several petitions, complaining of
 “ undue elections or returns of members to serve in
 “ Parliament, shall, at the same time, be offered to be
 “ presented to the House, Mr. Speaker shall direct
 “ such petitions to be all of them delivered in at
 “ the table, where they shall be classed, and read in
 “ the following order, viz. Such petitions as complain
 “ of double returns, in the first class; Such as com-
 “ plain of the election or return of members returned
 “ to serve for two or more places, in the second class;
 “ And the residue of the said petitions, in the third
 “ class: And the names of the places—&c.” *as in
 the order before recited of the last session.*

* 35 Journ. 407.

† 38 Journ. 11.

In the session next following, the same order as above-mentioned passed, confirming the former in respect of renewed petitions *. Soon after the meeting of the present Parliament, it was thought necessary to make a new subdivision in the classes of petitions, as before stated.

These modes of arrangement relate only to the order in which petitions are to be *read*, when several are delivered together; the name which the House may choose to give to the subject of each, cannot be supposed to operate further than is necessary to direct their proceeding in this respect: For it would be contrary to the words and spirit of the stat. 10 Geo. III. to give, by these orders, any instructions of duty to the election Committees, whose jurisdiction over petitions is independent of the House, and conclusive upon the question. Nor can it be intended for this purpose, as is plain from the practice in case of the delivery of one petition only, and in the case of presenting *new* petitions in sessions subsequent to the first of a Parliament; in which the above orders do not operate.

I have not been able to discover with certainty when the House began to distinguish between the *return* and the *merits* of an election, in the trial of petitions: The general order of instructions to the old Committees of privileges and elections, contained no reference for this purpose; the only distinction made in that order, was that for giving a preference to the cases of double returns. But it has been usual, for more than a century past, to make special references of petitions to those Committees, when the circumstances of the case were thought to require it; as in the case of Clithero, in

* 38 Journ. 594.

1706, (15 Journ. 232.) and the case of Steyning in 1711, (17 Journ. 117.) "to hear the merits of the return first." In the case of Wigan, in 1713, (17 Journ. 493.) "to examine first into the manner of signing the petition," and in a great variety of cases. However, the former mode of referring petitions can have no influence upon the present, any more than the former mode of trying them; the House *then* acted discretionally, *now* it must follow a method prescribed by the law of the land.

Before I quit this subject, it may be proper to explain how it happened, that the cases of Pontefract and Ipswich, were appointed to be heard, before those of Mitchell and Downton, which were double returns: For though there is now no order for the priority of *hearing* cases of double returns*, yet the House has followed the antient course in this respect: So it would have happened in these two cases, had not the parties themselves intimated, that they could not be prepared by the time intended to be fixed for the hearing of the first petitions of the session; the parties in the two first, being prepared, took their station of precedence, that no time might be lost.

P. 326. (B.) The same opinion prevailed in the case of Morpeth, in 1774: There were four candidates; one candidate and his friends, had presented petitions against the *return*, for the consideration of which, a day was appointed; afterwards, another candidate and his friends, petitioned upon the merits of the election, and these petitions were ordered to be taken into consideration on the same day with the former: But before

* See 1 Doug. Elest. 48, 49.

that day, a motion was made for separating the claims of the parties and their petitions, by putting off the petitions upon the *election* to a subsequent day; which after a debate (and division on one part of the question) was carried *.

P. 327. (C.) When I heard this argument, it seemed to me fallacious, and I have been confirmed in my opinion by subsequent reflection. The great difference between the present and former jurisdiction and practice of the House, upon these occasions, has been slightly mentioned in p. 405. Note (A.); from this difference it follows, that any resolution of the sort contended for, can have no other effect upon the election Committee than that of shewing the opinion of the House, declared extrajudicially; which has no more binding force, than a resolution of the House of Lords for the same purpose. It seems to me that no petition ought to be referred to an election Committee, or to occasion a ballot, but such as is described by the stat. 10 Geo. III. and upon which the House exercises no other discretion than that which forms require; and likewise, that no reference should be considered by those Committees as binding, but such as that act makes the foundation of their jurisdiction.

The House itself appears to have considered the subject in this view, by a resolution in the beginning of the Parliament of 1774, the entry of which in the Journal is as follows:

(An election petition being presented) "The House
" was moved, that an act made in the 10th year of
" his present Majesty, intituled, '*An Act to regulate the*

* 35 Journ, 61.

" *trials of controverted elections, or returns of members to serve in Parliament,* ' might be read.

" And the same being read accordingly,

" Resolved,

" That according to the true construction of the said act, whenever a petition, complaining of an undue election or return of a member to serve in Parliament, shall be offered to be presented to the House, within the time limited by the order of the House for questioning the returns of members to serve in Parliament, the said petition shall be delivered in at the table, and read, *without a question being put thereon* *."

Those who contended for referring the petition in question, for the purpose mentioned, would perhaps in the event have been deceived in their expectations. This Committee in fact rejected two points of Lord Ongley's petition. By the resolution stated in p. 376. it appears, that they must have judged of their competency to enter upon those parts of it, though the House had referred to them the *whole* petition as against the *return only*. This power is a necessary consequence of the jurisdiction. The first argument in the cause, on the part of the sitting member, had very much the appearance of a plea to the jurisdiction, founded in the impropriety of the resolution of the House; but it was not on that account discountenanced by the Committee: Nor does it at all follow from their decision, that they were guided to it, by the vote of prejudication in the House.

The House formerly could, and often did, refer *parts* of petitions to the Committees of privileges and

* See 35 Journ. 10.

elections; but they cannot follow this course now: When an election petition is read, a day must be appointed for balloting for the select committee to try it. This instance alone is sufficient to illustrate the observation above made, that the power I am contending for is a necessary consequence of the new jurisdiction.

The argument used by the counsel for the petitioner in p. 337. 'that the oath binds them to try the matter of the petition,' is, in the sense in which they urged it, equally applicable to juries, when sworn *to try the issue*; who, notwithstanding, are very well satisfied with the discharge of their duty, when they give themselves no concern about the issue, if the judge should inform them that in law they ought not to try it. But it seems to me, that according to the true construction of the oath, the petition would be *tried*, and the duty would be fully discharged, conscientiously as well as legally, by declining to enter upon the matter of a petition, if the members should be of opinion that it was not in point of law fit for their consideration.

P. 334 (D.) By the third section of stat. 7 and 8 Will. III. ch. 25. It is enacted, That in case a poll shall be required at a county election, "the sheriff, or, in his absence, his undersheriff with such others as shall be deputed by him, shall forthwith there proceed to take the said poll, in some open or public place or places, by the same sheriff, or his undersheriff as aforesaid in his absence, or others as aforesaid, appointed for the taking thereof. And for the more due and orderly proceeding in the said poll, the said sheriff, or, in his absence his undersheriff or such as he shall depute, shall

appoint such number of clerks as to him shall seem meet and convenient, for taking thereof: Which clerks shall all take the said poll in the presence of the said sheriff, or his undersheriff, or such as he shall depute. And before they begin to take the said poll, every clerk so appointed, shall by the said sheriff, or his undersheriff as aforesaid, be sworn truly and indifferently to take the same poll, and to set down the names of each freeholder, and the place of his freehold, and for whom he shall poll; and to poll no freeholder who is not sworn, if so required by the candidates or any of them: (which oath of the said clerks, the said sheriff, or his undersheriff, or such as he shall depute, are hereby empowered to administer) And the sheriff, or in his absence his undersheriff as aforesaid, shall appoint for each candidate such one person as shall be nominated to him by each candidate, to be inspectors of every clerk who shall be appointed for taking the poll."

This provision is enforced by the seventh section of 18 Geo. II. ch. 18. which requires a certain number of booths to be erected for taking the election; and by sect. 9. "The sheriff, or in his absence, &c. (*as before*) shall allow a cheque-book for every poll-book, for each candidate, to be kept by their respective inspectors, at every place where the poll shall be taken or carried on."

P. 389. (E.) This case was determined in Michaelmas term, 1783. The claims of the parties had been directed by the court, to be tried upon the issue, "*Which of them had been duly elected;*" At the trial, the defendant admitted, that, in fact, a majority had elected the plaintiff; but contended, that, according to an agreement of the parties before the election, the right of voting

voting was considered for that time, to be in *residents* only, and that of them he had a majority. The judge rejected the defendant's witnesses as incompetent from interest; but on a motion for a new trial in the court of King's Bench against the judge's decision, all the judges there agreed (though they differed upon other considerations, as to the propriety of granting a new trial) that the witnesses were competent; that, the election being over, and the agreement *pro hac vice* only, they had no interest but such as related to their future right on another election, with which their past right had no connection.

The counsel who supported this side of the question, relied upon the case of the King and Bray, which they cited from the law of *Nisi Prius* *. Mr. Justice Buller in delivering his opinion, said, "The rule laid down by Lord Hardwicke, in that case, should be always followed, viz. That if the interest be doubtful, the objection goes to the *credit* only; and this rule extends to all cases, where it is uncertain whether there is an interest." Mr. Justice Ashurst who had tried the cause, retracted his former opinion. Lord Mansfield said, "Competency in our law has been carried to an extravagant length; as in the cases of commoners and others, where the interest is hardly discernible: I would not draw this line tighter, but incline to the rule of Lord Hardwicke —."

The words of Lord Hardwicke, stated in the book above referred to are these, "In doubtful cases, he said, it was his custom to admit the evidence, and to give such directions to the jury as the nature of the case might require."

* Edit. 1772. p. 286.

P. 390. (F.) Lord Hardwicke, in p. 360. of the Reports of Cases in his time, says, (after distinguishing between an *office* and an *authority* in the Elisor's case) " I know no instance, where a man by having a bare authority, which gives him no interest, will be hindered from being a witness, if he is not a party in the cause; so a bailiff who executed a writ may be a witness, if he is not a party; but an *office* always gives an interest.— If we should allow of such doctrine, (*i. e. that the being subject to an information affected the witness's competency*) it would go too far; for it is daily experience, that persons who have executed offices in corporations, when that office has been afterwards called in question, have been allowed as witnesses to prove, if it depends on custom, what has been usually done; Yet they are liable to informations in *quo warranto*, if the custom should not warrant the office——."

VI.

T H E

C A S E

Of the BOROUGH of

COLCHESTER,

In the County of Essex.

The Committee was chosen on Thursday, the 1st of July, and consisted of the following Members :

Sir Herbert Mackworth, Bart. Chairman.

Robert Smith, Esq;

Lord Milford.

James Amyatt, Esq;

Sir John Trevelyan, Bart.

Sir John Jarvis, K. B.

George Jennings, Esq;

Sir William Molesworth, Bart.

Philip York, Esq;

Daniel Pulteney, Esq;

William Pochin, Esq;

Francis Annesley, Esq;

Thomas Aubrey, Esq;

NOMINEE,

Of the Petitioner,

Sir Joseph Mawbey, Bart.

Of the Sitting Member,

John Mortlock, Esq;

PETITIONER,

Sir Robert Smyth, Bart.

Sitting Member,

Christopher Potter, Esq;

COUNSEL,

For the Petitioner,

Mr. Piggott and Mr. Graham.

For the Sitting Member.

Hon. Mr. Erskine and Mr. Mingay,

T H E
C A S E

Of the BOROUGH of

C O L C H E S T E R.

THE petition alledged, That at the last election for the borough of Colchester, Sir Edmund Affleck, Bart. Christopher Potter, Esq; and the petitioner were condidates; that the petitioner had the majority of legal votes, but that the mayor, from partiality to Mr. Potter, illegally rejected rightful votes for the petitioner, and admitted illegal votes for Mr. Potter; That Mr. Potter, by these means, and also by bribery, had procured himself to be unlawfully returned. “ And that a
“ Commission of bankrupt was issued
“ against the said Christopher Potter, on
“ the 17th of April 1783, and he was
“ there-

“ thereupon found and declared a bankrupt; and on the second day of the month of May following, an assignment of all his estate and effects whatsoever was made for the benefit of his creditors; And that at such time the said Christopher Potter had no freehold estate whatsoever; and from the estate and effects of the said Christopher Potter, the petitioner is informed no more than two shillings and six-pence in the pound has been paid to his creditors; And for these reasons*, the petitioner begs leave to represent to the House, that the said Christopher Potter had not, at the time of the said election, such an estate in law or equity, for his own use and benefit, of and in lands, tenements or hereditaments, as qualified him to be elected and returned to serve as a member for the said borough, according to the law in that behalf made and provided, and that the said Christopher Potter was not capable of being elected and returned†.”

* The reader will see in the course of the cause, the reason for copying this part of the petition at length.

† Votes, May 25. p. 24.

Their

COLCHESTER. 417

There is no resolution of the House of Commons of the right of election in Colchester: In the several controverted elections that have happened since the year 1628, the parties have agreed upon this point. The entries in the Journals of these agreements were mentioned to the Committee by the counsel: The first is in 11 Journ. 536. on 28 march 1696. "It was agreed to be in the sworn burgesſes not receiving alms:" On 27 january 1710-1, in 16 Journ. 470. "— in the mayor, aldermen, common council and burgesſes:" On 6 may, 1714. in 17 Journ. 616. "— in the mayor, aldermen, common council and free-burgesſes not receiving alms" (A.) No question aroſe in this cauſe upon the right of election.

The due election of Sir Edmund Affleck was admitted by both parties.

The numbers on the poll for the ſeveral candidates, were

For Affleck	665
Potter	425
Smyth	416

At the election, Mr. Potter was formally called upon to ſwear to his qualification,

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and he delivered in a paper containing an affidavit of a sufficient estate, sworn before the mayor.

The counsel for the petitioner in opening his case, stated, That they intended to prove that seventy three bad votes had been admitted on Potter's side, and thereby to give their client a great majority on the poll. They said they would forbear to enter into particulars upon that point in the opening, because they hoped to secure the seat to the petitioner, by proceeding first of all, upon the charge in the petition against the sitting member's qualification; That in the prosecution of this charge, they should prove him to be incapable of supporting his election, after which it would be only necessary to disqualify so many of the opposite votes, as would leave the majority with Sir Robert Smyth. They did not insist upon the supposed disqualification by Mr. Potter's bankruptcy; probably they were aware of a fact that was afterwards offered to be proved on his part, viz. That he had obtained a certificate from his creditors before the time of the election.

election. Therefore the argument was confined to the standing orders of the House of Commons, as connected with the statutes of qualification.

In order to understand this question, it is necessary to state the statutes and orders of the House upon the subject of a member's qualification by estate.

By stat. 9 Anne, ch. 5. sect. 1. " — no person shall be capable to sit or vote as a member of the House of Commons *, " for

* The remainder of this section is substantially as follows: " — who shall not have an estate, freehold or copyhold, for his life or greater estate, for his own use, in lands or hereditaments, clear of incumbrances, within England or Wales, of the annual value of 600l. above reprises for every knight of a shire, and of 300l. above reprises for any other member: And if any person shall not, at the time of his election and return, be intitled to such an estate as is respectively required, such election and return shall be void." Sect. 2. excepts from this provision the eldest sons of peers, and of persons qualified as above to be county members. Sect. 3. excepts members for the universities. Sect. 4. restrains the qualification by mortgage to certain terms. Sect. 5. & 6. prescribe the form of an oath for ascertaining the qualification, which candidates are to take, if required either at the election or before the meeting of Parliament. Sect. 7. impowers the returning offi-

for any place in England or Wales, without possessing an estate of 600*l.* a year, if member for a county, and 300*l.* a year, if member for a town (B).

By the standing orders of the House for enforcing the provisions of this statute, first passed in 1713-4, and made standing orders on the 21st of november, 1717*,

1. "Notwithstanding the oath taken by any candidate, at or after any election, his qualification may afterwards be examined into."

2. "The person whose qualification is expressly objected to in any petition relating to his election, shall, within fifteen days after the petition read, give to the clerk of the House of Commons, a paper signed by himself, containing a rental, or

cer, or any two justices, to administer the oath, and requires them to certify it into the Chancery, or King's Bench, under a penalty; "and if any of the said candidates or persons proposed to be elected as aforesaid, shall wilfully refuse, upon reasonable request to be made at the time of the election, or at any time before the day upon which such Parliament by the writ of summons, is to meet, to take the oath hereby required, then the election and return of such candidate or person shall be void."

* 18 Journ. 629.

particular of the lands, tenements, and hereditaments, whereby he makes out his qualification; of which any person concerned may have a copy."

3. "Of such lands, &c. whereof the party has not been in possession for three years before the election, he shall also insert, in the same paper, from what person, and by what conveyance, &c.—and the names, &c.—"

4. "If any fitting member shall think fit to question the qualification of a petitioner, he shall, within fifteen days after the petition read, leave notice thereof in writing with the clerk;—and the petitioner shall, within fifteen days after such notice, leave with the clerk the like account—of his qualification, as is required from a fitting member (C)."

After a considerable experience, it was found necessary to guard against a method of evading this last order, which perhaps had been put in practice, by presenting a petition in the names of the *electors*, and not from the unsuccessful candidate. The House therefore extended their resolution

to this case, by passing another on the 6th of february, 1734-5, the entry whereof is as follows :

“ The House was moved, that the stand-
“ ing orders of the House, made the 21st
“ of nov. 1717, in relation to the quali-
“ fication of members, might be read.
“ The same were read accordingly.

“ Resolved, That on the petition of any
“ elector or electors, for any county, city,
“ or place, sending members to parlia-
“ ment, complaining of an undue election
“ and return; and alledging that some
“ other person was duly elected, and ought
“ to have been returned ; the sitting mem-
“ ber so complained of, may demand and
“ examine into the qualification of such
“ person so alledged to be duly elected, in
“ the same manner as if such person had
“ himself petitioned *.”

This resolution was then made a stand-
ing order.

In the year 1759, it was thought neces-
sary to add further regulations by act of
Parliament, to render the statute of Anne

* 22 Journ. 355.

more effectual: This was done by stat. 33 Geo. II. ch. 20. wherein it is enacted that all members of the House of Commons (with the former exceptions) before they presume to vote, or sit, in the House, shall publicly deliver in at the table while the House is sitting, a schedule of their qualifications, specifying the situation, &c. and shall take and subscribe an oath of the truth of the schedule. The oath is to be enrolled, and the schedule filed by the clerk; And the election of a member not complying with this act, or not being duly qualified, shall be declared void, and a new writ shall issue.

Mr. Potter had not, at the time when this cause came on, taken his seat in the House, nor delivered in the particular of his qualification required by 33 Geo. II. and the second standing order above recited.

The counsel for the petitioner contended, That according to the statutes, and orders of the House of Commons, the sitting member was absolutely disqualified,

and his election void; they argued in the following manner;

No good reason can be assigned for making the second standing order, but for the purpose of excluding from the House those who shall not comply with it; it is a just and necessary conclusion, upon the legal principles of evidence, that he who disobeyes it, is incapable of complying with it, for want of the necessary estate; it is a presumption so strong, as to warrant a proceeding against such member, in the same manner as if the fact of incapacity were affirmatively proved.

Not knowing what ground of defence may be taken for the sitting member, there is little room for argument upon the subject, because the reasoning upon the premises, naturally and immediately leads to the conclusion contended for. It is hardly necessary, on the part of the petitioner, to shew any thing more than that the petition contains an express objection to the sitting member's qualification; this is clear upon the face of it.

The manner in which the House has, in several instances, enforced the standing order

order against petitioners, confirms this argument. The mode of expression in this order is the same as in the other; they are both positive injunctions upon the parties concerned, and therefore the breach of both, must, upon the principles above-mentioned, be equally penal.

The first case in which the House appears to have enforced those orders, is that of Honiton in 1715, the entry of which is in these words :

“ The House being acquainted, that Sir William Courtenay, and William Yonge, Esq; sitting members for the borough of Honiton, did, on 29th march last, pursuant to the resolution of this House of the 23d of the same march *, leave with the clerk of the House their demand of the qualification of James Sheppard, Esq; who petitioned, complaining of an undue election and return for the said borough, and that he had not delivered in to the clerk any paper of his qualification ;

* All the four resolutions had then passed. See 18 Journ. 20. and Note (C.)

“ The

“The demand of the said qualification was read; and also the resolution of the House of the 23d of march last was read. And the clerk being called upon, acquainted the House, That he had not received any particular of Mr. Sheppard’s qualification.

“*Ordered*, That the Committee of privileges and elections be discharged from proceeding upon the petition of the said James Sheppard, Esq; he having neglected to comply with the said resolution of this House, in not delivering in his qualification within fifteen days after the demand thereof*.”

The next proceeding of this sort happened in 1717, in the case of Leominster; the Journal of the 8th of may † of that year, contains an entry in the same words as the foregoing, with respect to both petitioners: The precedent of Honiton was then referred to and read to the House, and exactly followed.

In the case of Shaftesbury in 1722-3 ‡, the same proceeding took place with respect

* 18 Journ. 71.
Journ. 130.

† 18 Journ. 543.

‡ 20

to one of the petitioners, Mr. (afterwards Sir Clement) Wearg; and the Committee were discharged from proceeding upon so much of the petition as concerned him.

In the cases of Steyning in 1724-5 * — of Minehead in 1727-8 † — and of Westbury in 1734-5 ‡, the House passed the same resolution against the petitioners.

The standing order under which these proceedings were had, relates only to the *candidate* petitioner; but where the candidate has not petitioned, and the election has been questioned by the electors only, the House has enforced the explanatory order of 6th feb. 1734-5, in the same manner as the former. Soon after the making of that order, on the 21st of the following march, it was put in practice in the case of Liverpool; in which the electors alone having petitioned in behalf of their candidate, his qualification was demanded, and not being produced, the same order was made against him as in the cases before cited §.

* 20 Journ. 368.

† 21 Journ. 66.

‡ 22

Journ. 395.

§ 22 Journ. 426.

The proceedings here mentioned, being against *petitioners* only, it will no doubt be urged by the opposite counsel, that they are not in point to the present case, and do not bear upon a sitting member : But although there may be no precedent in which the order against a sitting member has been enforced in the same manner as that against a petitioner ; yet, as the principle of it is the same, it must necessarily have the same effect upon a case falling within the terms of it, as the present does : Perhaps no case of the sort may have happened before ; No argument alone will persuade the Committee that there is a difference, unless they can add to it ; an instance in which the House has put that construction upon their order. It might be argued, that the principle is applicable *a fortiori* to the case of sitting members ; for it is a greater offence in any member of a particular body to disregard its institutions, than in strangers.

However, there are two cases in the Journals, which are applicable to the case of sitting members, and illustrate the point
now

now contended for: In the case of Weymouth in 1730 *, " The counsel for the petitioner insisted, that Mr. Betts (the sitting member) having not complied with the act of Parliament which requires an oath of qualification, *nor with the standing order of the House*, which requires a particular in writing of his qualification to be left with the clerk of the House, his election is therefore void ; And that by consequence the petitioner having the next majority on the poll, was duly elected."——

The counsel for Mr. Betts admitted the facts, and the Committee (and afterwards the House) resolved that he was not duly elected. It was not necessary to go further in that case, and to seat the petitioner, because the latter did not contend (as Sir Robert Smyth now does) that he had the majority on the poll: Therefore the resolution only went to a void election. If it should be said in answer to this case, that it proceeds upon the *statute* as well as the order, it may be replied, that the evidence

* 21 Journ. 574.

stated

stated in the report, shews that Mr. Betts could not have been present at the election; so that he was not within the purview of the statute: Therefore the effect of this resolution is derived from the standing order only (D).

In the case of Malden, in 1715*, the House resolved, " That John Comyns, serjeant at law, having at the late election of members to serve in Parliament, for the borough of Malden, in the county of Essex, wilfully refused to take the oath of qualification as is directed by an act of parliament of the 9th year of the late Queen Anne, intituled, ' An act for securing the freedom of parliaments, by the farther qualifying the members to sit in the House of Commons,' though duly required so to do; and not having at any time before the meeting of this Parliament taken the said oath; his election is thereby void."

This case, it is true, proceeds altogether upon the statute; but the principle of the

* 18 Journ. 129.

standing

standing order, is to effectuate the regulation of the statute, and in this respect the same as that of the statute. The only difference between them is this; the statute prescribes one method of ascertaining the qualification, the standing order another: The conclusion of both is the same; by refusing to take the oath, the statute infers the deficiency; the order of the House infers it from the neglect to deliver a rental.

If the Committee should be of opinion that the sitting member, after his disobedience of the order, cannot retain his seat, they will declare that opinion; for the petitioner has a right to call for it from them, in this stage of the cause; because it will follow, that the sitting member cannot after that stand before them, as an opponent to the petitioner, in making out his claim; he thereby forfeits every pretension to a seat in the House upon this election, and consequently ought not to interfere with the claim of another. In this case it will be only necessary for the petitioner to disqualify ten votes on the part of the sitting member, to obtain the seat; for the petitioner

tioner admits that he ought to shew a majority on his side. This inquiry, it may be said, will be *ex parte*, and a hard case; but it is warranted by the practice of the House in such circumstances: In the case of Boffiney, 18 march, 1741-2 *, the sitting members not attending by counsel, the House allowed the petitioners to proceed in such an *ex parte* objection to the majority. No wrong will happen to the electors of Colchester, by this mode of proceeding, because if the petitioner should be seated, they may then, if they choose, petition the House against his election (E).

The counsel for the sitting member argued in the following manner:

The whole argument for the petitioner is confined to the standing order of the House; it is therefore admitted that the sitting member has not disobeyed either of the statutes; so far his seat is secured by the law of the land. In fact, he complied with the statute of Anne, by swearing to his qualification when requested: The

* 24 Journ. 135.

stat. of Geo. II. only lays down a rule for members, *when they take their seats*; he has not yet taken his seat, and is therefore free likewise from the penalty of that act.

Before the Committee can take the course desired in behalf of the petitioner, they must be persuaded, both that the petitioner has duly performed the part required of him in the standing order, by making an *express* objection to the qualification; and also, that the House of Commons, by their own orders, can make a disqualification not known to the law.

First, the standing order does not attach upon the sitting member, for the objection is not *express*; the petition does not directly aver the incapacity, but is argumentative, and supposes it by inference from the facts alledged, viz. "Having been a bankrupt, and not having at that time a sufficient estate,—*for these reasons*, &c. the said Christopher Potter is not qualified*." Now all these facts may be true and yet the conclusion does not follow. He *was* a bankrupt,

* See the petition, p. 416.

and might not have then had a qualification, but he was afterwards enabled by a certificate to acquire such property as gave him a qualification at the election; and the production of that certificate would be a sufficient answer to the charge of the petition, if it had been insisted upon now. The allegation ought to have been such, as if true, would have convicted the sitting member of perjury in his affidavit; because that alone would prove the incapacity.

The standing order could not mean to require more of a sitting member, than to disprove the petition; therefore where the want of estate is charged, he must shew one sufficient: But it would be absurd to put him to this trouble, when the charge, if true, would not prove him deficient in the estate required. Therefore the sitting member cannot be said to have disobeyed the standing order. More especially, the Committee ought to put this construction upon it, when it is contended that the contrary is to have the effect of expulsion.

But, secondly, supposing the sitting member to have disobeyed the standing order,

order, the point contended for, will not be the consequence of this construction, for the House of Commons *cannot make a legal disqualification*; the Legislature alone can do that.

The cases that have been mentioned to the Committee, do not establish this point; they are all just examples of practice respecting the order they depend on, but no more. If any one instance were produced, in which the House had enforced the order upon *sitting members* in the same manner, the Committee might follow it, without opposition from Mr. Potter. But it is impossible to find such a case.

There is a wide difference between the two cases: All suitors for justice must necessarily be subject to the rules and orders of the court in which they sue; its jurisdiction over them is absolute. The cases cited from the Journals are only illustrations of this rule, and of the manner in which the House of Commons has rejected claims, that were not regularly and justly made.

But a sitting member derives his place from a power without the jurisdiction of

the House;—from the original source of authority in his constituents. Their election invests him with an office of which nothing but the law of the land can deprive him, and by the return he becomes legally fixed in it. Now the argument on the other side tends to this: Although a man is lawfully possessed of this right, has disobeyed no law in acquiring it, and is duly qualified to hold it according to the *statutes*, yet it shall be taken from him by reason of a constructive disability, deduced from a rule of practice of the House of Commons. To inforce this doctrine, would be to revive the precedent of the Middlesex election, of which the House itself was afterwards ashamed, and by a public vote has expunged it from the Journals*. The Committee therefore will not assume a power which the whole House does not possess, and which it has never attempted to exercise in circumstances like the present.

But the counsel on the other side, not satisfied with the expectation of a decision declaring the election void, claim to be ad-

* See 38 Journ. 977. 3 May, 1782.

mitted to the sitting member's seat. Their authorities for this point fall very short of it: The case of Weymouth, rather leads to a contrary conclusion, for it recites expressly that Mr. Betts *had not complied with the statute*; so that he was absolutely disqualified by law. It is said, the report shews he was not present at the poll; Be it so: The penalty is inflicted by the statute, upon a refusal to take the oath *at any time before the meeting of Parliament*; and it appears that the petitioner's counsel objected that Mr. Betts had not complied *with the statute*. The evidence there produced to the Committee, seems to have been of a request made to him at his own house after the election (D).

In the case of Malden, the question arose entirely on the statute of Anne; but even there the cause was regularly carried on between the incapable candidate and the petitioner, and the former was allowed to maintain the merits of the election against the latter; nor did the petitioner's counsel attempt to exclude him from it. Perhaps in this respect, the House did not go far

enough; for Serjeant Comyns, when the act was read to him at the poll, before the election, and in the presence of the electors, refused to comply with the act, and to take the oath. When the House afterwards resolved that this was a *wilful refusal* (F), they might very justly have seated the other candidate; upon the principle, that the electors who voted for him after this public refusal, knowingly threw away their votes*.

But Mr. Potter, at the election complied with the statute, and regularly swore to a qualification.

The case of Boffiney does not at all affect the present, because the sitting members there did not attempt to defend themselves; the entry in the Journal states expressly “that they desired not to give the House any further trouble †.”

The counsel for the petitioner observed in reply,

* The petitioner was seated in this case; but it is made doubtful by the report, whether the resolution for this purpose proceeded upon the effect of the sitting member's disqualification, or upon the majority of the petitioner's votes.

† See the beginning of col. 2. of p. 135. vol. 24.

That

That the counsel for the sitting member had failed in establishing a difference between the cases of sitting member and petitioner, as affected by the standing order; That they had not weakened the principle upon which their argument for the petitioner had proceeded, which was, that the order in both cases prescribed a *rule of evidence* in aid of the regulations in the statute, by which the legislative disqualification was to be proved. It is not *making* a disqualification in one case, more than in the other; for the candidate who is not returned, if elected by the majority, acquires the same lawful right, from which it is said, nothing but the law of the land can deprive a sitting member: A return, disputed, does not affect the right one way or other. A resolution of the House, therefore, can no more deprive a petitioner of this right, than a sitting member. In both cases, while the petition is depending, this *right* is *sub judice*; and therefore, supposing the standing orders to be *rules of practice* only,

they are equally applicable to both parties : They are both, parts of one system.

The words of the order “ *expressly* objected to” evidently mean to describe such an objection, as must inform the sitting member that his qualification *by estate*, is disputed ; — to describe this, in contradistinction to other grounds of disqualification, by office, by minority, &c (G). Now, though the petition here states a great deal more than necessary, it is impossible to read it without seeing an absolute denial of the sitting member’s qualification *by estate*, in plain terms : It may be in part argumentative, but it is also *express*. The *form* of the petition will not prevent its operation, while it has substance enough.

If the just and necessary conclusion from the breach of the order, be, as is contended for by the petitioner, that the sitting member is not duly qualified, the Committee ought to determine his election to be void. Their next inquiry must be into the election of the petitioner ; this is a necessary consequence of such a decision ; for if a candidate has a majority of votes, his
election

election can never be avoided. As to the argument, that a majority over Mr. Potter's numbers, may not be a *true* majority, that can only take place as between the electors and the petitioner; Mr. Potter cannot use it. The electors may *afterwards* *, if they choose, make this objection. The question here (if the Committee shall decide against the sitting member) will be the same as if he had died. But, at present, it is unnecessary to enter upon this point, which will come to be considered, after the Committee shall have formed their opinion upon the first.

After the Committee had deliberated, the chairman informed the counsel that they had

“ Resolved, *That the petition presented by Sir Robert Smyth, Bart. does contain an express charge of want of qualification, against the sitting member.*”

“ Resolved, *That Christopher Potter, Esq; has not complied with the standing order of the House of the 21st of November 1717, which requires, ‘ that the person whose qua-*

* See Note (E).

‘ lification is expressly objected to in any petition relating to his election, shall, within fifteen days after the petition read, give to the clerk of the House of Commons a paper, signed by himself, containing a rental or particular of the lands, tenements, and hereditaments, whereby he makes out his qualification.”

“ Determined, *That the last election of members to serve in parliament for the borough of Colchester, in the county of Essex, is, so far as relates to Christopher Potter, Esq; a void election.*”

After these resolutions were communicated to the bar, the counsel for the petitioner resumed that part of their case by which they claimed the seat for their client; and proposed to shew that he had a majority over Mr. Potter, by disqualifying ten of his votes, which would leave the numbers for Mr. Potter 415, for Sir Robert Smyth 416. They said,

The election of the sitting member being declared void, he could have no pretence to maintain his station in the Committee, in opposition to the petitioner; if that
were

were to be permitted, there would be no difference between persons qualified and disqualified, and the difficulty of opposing an incapable person would be the same as if the most capable had stood in the same place. If the objection to the fitting member had never been made, the utmost privilege of his situation would not have enabled him to do more than is now contended for in his behalf, after his incapacity is recorded.

The effect of the Committee's decision, is to put the fitting member in the same situation with respect to the petitioner, as if he were outlawed or dead; and it would be unreasonable to allow a person in that character, to carry on a cause in which he can have no interest (I). The only character in which he ought to appear before the Committee is annihilated; to allow of his remaining in the cause, is to invest him with a new one, for the sole purpose of opposing the petitioner.

It may be said, to be a hard case upon the electors, but if they will make their representative one who is unworthy of the place,

place, they must suffer for their folly. The case of Boffiney has been mentioned, upon which it has been observed, that the sitting members did not contest the point; but nothing of this appears, till *after* the House had allowed the petitioners to go through their whole case *ex parte*: It is therefore a precedent to warrant this proceeding. In the case of Callington, 17 feb. 1772 *, the petitioner having died after presenting his petition, and before the time appointed for the hearing, the House discharged the order for hearing it; thereby in effect adjudging the sitting member duly elected: In this there was the same disregard of the electors which has been imputed to the present claim, where mere accident, and no default of theirs, prevented the inquiry into the election.

The counsel for the sitting member contended,

That the Committee must, from necessity, either admit the sitting member to support the rights of those electors who sent him to Parliament, in opposition to the petitioner, or else, give the electors an

* 33 Journ. 481.

opportunity of exercising their franchise again, by the declaration of a void election without any further proceeding. There is no petition from these electors, nor could there be one, because their candidate had succeeded, and possessed the seat.

The counsel cannot produce any instance from the Journals to warrant their mode of proceeding: It is said, that in the case of Boffiney, the proceedings were *finished*, before it appeared that the sitting members did not contest the seats; but the only material part of the proceedings, came *after this declaration* on the part of the sitting members. The Journal states the evidence on the side of the petitioners, then states that the sitting members were absent, and had authorized a member present, in their names, to give up the point; *after which follow the resolutions, adjudging the seats to the petitioners* *.

The Committee cannot in justice accede to the petitioner's proposition, unless they should be of opinion that the electors

* 24 Journ. 135.

threw away their votes, when they gave them to Mr. Potter: Now this is impossible, because he went through every necessary requisite at the election, and was a lawful candidate; they could not foresee that he would afterwards disobey the order of the House, and thereby incur a disability. To annul their votes on account of this disability, is to make them suffer by a judgment *ex post facto*. Where votes are held to be thrown away, it is always owing to some disqualification apparent at the time, and known to the electors; which if they disregard, they wilfully incur the loss of their votes. This happened in the cases of Fife in 1780, and Kirkudbright in 1781; and upon this principle the petitioners were seated in those cases (H).

The case of Callington does not affect the present; the whole circumstances of it must be reversed in order to suit the petitioner's purpose: If he could shew a case in which, upon the death of a *sitting member*, the house had allowed a *petitioner* to take his seat without opposition, it would support the argument (I). But the case
of

of Callington shews only, that upon the death of a petitioner, his petition must necessarily drop with him.

On monday, July 5th, the Committee resolved,

"That the election of Christopher Potter, Esq; for the borough of Colchester, having been declared void, the counsel be restrained from entering into any examination, relative to the disqualification of votes on the poll for the said borough of Colchester."

On the same day the chairman reported to the House, "That the Committee had determined——*" (*in the words of the resolution stated in p. 442*), in consequence whereof a new writ was ordered (K).

* Votes, 5 July, p. 363.

N O T E S

ON THE CASE OF

COLCHESTER.

PAGE 417. (A.) In the elections in 1710 and 1714, the dispute chiefly depended upon the right of making freemen of the borough, which in each of them occasioned resolutions from the Committees, acceded to by the House, declaring to whom it belonged.

There is an entry in the Journal of 28 march, 1628, that seems to have settled the right of election, as it is now understood, though it has not been referred to in any of the late contests: It amounts only to a resolution of the Committee, not expressly confirmed by the House, and therefore is not within the meaning of stat. 2 Geo. II. ch. 24. s. 4. The whole of this entry is as follows:

“ Report made from the Committee of privileges by
“ Mr. Hackwill.

“ I. For Colchester:—Only one return made by
“ the bailiffs, in which Sir Thomas Cheeke and Mr.
“ Alford returned. That the bailiffs, aldermen, and
“ common-council, consisting of 42, in an upper room
“ read the writ, and there elected Sir Thomas Cheeke
“ and Mr. Alford. In a lower room, the common
“ fort

“ sort of burgesſes in general elected Sir Thomas
“ Cheeke and Sir William Maſham.—

“ That the bailiffs, &c. made their election *by pre-*
“ *ſcription*, as they now made it.—

“ Againſt this—alleged, that till Rich. I. no bai-
“ liffs ;—from thence till Edw. IV. no common-coun-
“ cil: Then 16 appointed by a new charter, which by
“ conſtitutions ſithence they have increaſed to

“ Upon this, the preſcription holden inſufficient—
“ That the Committee alſo of opinion, that the elec-
“ tion of Sir William Maſham—good ; and Sir W.
“ Maſham’s name to be put in by the bailiff, inſtead of
“ Mr. Alford.

“ Upon queſtion, Sir W. Maſham duly elected, and
“ Sir W. Maſham his name to be by one of the bailiffs
“ now in town inſerted in the indenture of return in
“ the place of Mr. Alford: Which accordingly pre-
“ ſently done at the board *.”

P. 420. (B.) According to the true ſpirit of this ſtatute, no perſon ought to have been elected, who was out of the kingdom at the time of his election: At leaſt, the principal proviſion of the ſtatute might have been evaded by a member’s abſence from the kingdom, till after the meeting of Parliament. This defect is now remedied by the regulation of 33 Geo. II. ch. 20. whereby the member’s oath is made a preliminary to the acquiſition of a ſeat in the Houſe upon his election. The ſtatute is alſo defective in not requiring an oath of the truth of thoſe facts, which except certain perſons from the neceſſity of taking the oath of qualification.

* 1 Journ. 876.

P. 421. (C.) The first general election after the passing of the statute of Anne, was that for the Parliament called in 1713; and these four resolutions were first made in the beginning of that parliament. The House, on the third day after they had entered on public business, resolved to take the statute into consideration*; and in a Committee of the whole House, the resolutions were formed, and upon report to the House, agreed to†: Another day was at the same time appointed for a further consideration of the act, but no other resolution passed‡. In the beginning of the next new Parliament, 1 Geo. I. the House passed the same resolutions again§, but they were not made standing orders till 21 nov. 1717.

P. 430. (D.) The entry in the Journal is as follows (next after the passage recited by the counsel in P. 429.)

“ To prove the demand of the oath of qualification, the petitioner’s counsel called

Robert Loder, who produced a copy of the demand made by Mr. John Ward, signed by four electors, viz. John Ward and three others; and said he believed Mr. Betts was not at Weymouth at the time of the election.

John Savage said he delivered to Mr. Betts, at *Ep-som*, a paper signed by four of the electors, demanding his qualification, and acquainted him that it came from Mr. John Ward; to which Mr. Betts answered, that he never had any thing to do with Mr. Ward, nor ever would. This demand the witness made and delivered

* 17 Journ. 482.

† Ib. 489, 491.

‡ Ib. 492.

§ 18 Journ. 20. 23d March, 1714-5.

to Mr. Betts; the 4th of October, 1727. Being cross-examined, he said, that Mr. Betts told him he was not obliged to give an answer: That he laid it down on the table and did not read it:—

The counsel for Mr. Betts admitted, that his qualification is not sworn to, nor a particular of it delivered, although they alledged, that he is qualified, and had served in former Parliaments; but is now grown infirm and not able to attend the service of the House: And insisted that the electors, *being not apprized of this, ought to have an opportunity of making another choice.*"

Then follow the resolutions, that neither party was duly elected, and that the election was void as to Betts.

There can be little doubt, upon this report, (from the mention of Mr. Betts's *infirmity*, the delivering the demand at *Epsom*, and the evidence of the petitioner's witness that *he believed he was not present* at the election) but that the demand of the qualification was made at Mr. Betts's own house after the election, according to the argument of the counsel in p. 437.

The writs for this Parliament bore *teste* on 10 aug. and were returnable 28 nov. 1727*. The demand was made on Mr. Betts 4 October: It is very improbable, that a borough election should have taken place, so long after the date of the writ.

P. 432. (E.) This is questionable: The common annual order of the House, that parties may petition "within fourteen days after any *new* return shall be brought in," is not considered even to extend to the case of a determination upon the *return only*, after a special reference of the House for that purpose; but a

* See 21 Journ. 16.

particular order is always made, for permission to the electors to question the election, at the time when such determination is recorded in the House; an instance of which may be seen in the case of Bedfordshire, p. 398. Yet, according to the equitable construction of that annual order, a determination of this sort, altering the sheriff's return in favour of another candidate, might very fairly have been considered as a *new* return.

I own I see no objection, upon the principles upon which the House make the particular order alluded to, to the course of proceeding supposed by the counsel for the petitioner. Where the merits of a disputed election have not been heard, it is just that the electors should have an opportunity of questioning it; of this they are expressly deprived, by the partial inquiry which takes place upon the special reference, and therefore another order becomes necessary afterwards, expressly to give it them. But it may happen, that though the *merits of an election* be referred to a Committee, their decision may be formed partially, from circumstances extrinsic to the election, as in the case here contended for by the counsel. In such case, it would be as reasonable to allow the electors, the same opportunity of questioning the election afterwards, as in the other case of the return.

It is true, the House never make the order for leave to petition, where a petition has been referred upon the merits of the election; At least, they never used to make it, under the old judicature. But, it should be considered, that a change has happened in this respect, by the erection of the new judicature: Formerly, the Committees of elections acted under the controul of the House, by whom their power of inquiry

was

was either limited or extended, their proceedings were liable to be interrupted or directed in their course, or finally to be set aside after their conclusion. All their resolutions were subject to revision, and the House could carry them into effect accordingly; and could regulate its own proceedings, conformably to those which had passed in the election Committees, with little ceremony. But it is not so now; the House cannot know the grounds upon which a judgment of the select Committee may have been formed, and can neither receive it in part, nor reject it: It becomes absolute by the report to the House. If any supplemental proceeding should be wanting, the House cannot enter upon it, without a particular application for the purpose from the select committee, stating their reasons.

The method which occurs to me, as likely to obtain the end, if it should ever be thought necessary to allow electors to question an election, after the judgment given by a Committee on a petition upon the merits, would be for the chairman to make a special report of their judgment, recommending to the House to make an order for leave to petition, for the reasons they may think proper to give.

If in the case of Callington, mentioned in p. 444. the electors had presented a petition to the House, stating the death of Mr. Buller, by which accident they were deprived of the ordinary method of questioning the election, and therefore praying leave to petition upon the grounds of Mr. Buller's petition, I can hardly suppose, that such an application, fairly made, would have been rejected. (See the conclusion of Note (I). in p. 457.)

P. 438. (F.) The decision against Serjeant Comyns seems to have been a very severe one; for there was good reason, upon the evidence stated in the report, to have believed that the demand of the qualification was afterwards dispensed with, by those who made it. (See 18 Journ. 127, 128.) But all the proceedings that I have met with in the Journals, both with respect to the statute, and the standing orders, have been very strict. Instances of this may be seen in the cases of Shaftesbury, 18 Journ. 69:—of Wendover, 22 Journ. 466, 467, 468.—and of Huntingdon, 23 Journ. 413, 414.

P. 440. (G.) The justice of this observation cannot be doubted: It is therefore remarkable, that in the case of Weymouth, the words of the petition (if fully set forth in the Journal) were, "*That Mr. Betts is not qualified to sit in Parliament,*" without any thing further *. The counsel for the sitting member did not object to the form of the petition, on this account; but it was not necessary, because they admitted that their client had not complied with the *act of Parliament*; and the breach of the standing order, thereby became an unnecessary consideration.

But it is more remarkable, that this objection was not taken in the case of Huntingdonshire (23 Journ. 403, 413, 414.) where the words of the petition were, "*That at the time of the election, the said Mr. Clarke was not qualified according to law, to sit and vote in the House of Commons as a knight of the shire for the said county.*" In this case the whole proceeding depended upon the standing order, and the only question arose

* See the petition, 21 Journ. 47.—renewed, ib. 203.—and renewed again, ib. 399.

upon the rental delivered in by the sitting member in pursuance of it.

P. 446. (H.) The case of Kirkudbright here alluded to, has been mentioned in the former part of this book, upon a different subject. (See p. 72.) In the case of Fife, General Skene and Mr. (now Sir John) Henderson were candidates; the former was returned; the latter petitioned, and alledged, "That General Skene the sitting member was ineligible, under the stat. 6 Ann. ch. 7. by holding the places of Baggage-master of the Forces, and Inspector of the roads in Scotland; one or both of which were new offices of profit created subsequent to 25 oct. 1705: That at the election the petitioner apprised the freeholders, of General Skene's possession of these places, of his consequent incapacity, and that they would throw away their votes, if they elected him*." At the meeting, General Skene admitted his holding the offices in question, but denied that the disqualification created by the statute of Anne attached upon either of them, because they were *military* offices, and *old* ones. He was elected by the majority. The Committee before whom the petition was tried, being of opinion, that the novel creation of one of the offices was notorious, and that it was within the statute of Anne, held that under the circumstances before-mentioned, the electors who voted for the sitting member had thrown away their votes, and adjudged the seat to the petitioner, who had the minority on the poll †.

* See 37 Journ. 500. 9 Dec. 1779.

† See 37 Journ. 560, 561. 7 Feb. 1780.

P. 446. (I.) In the case of Mitchell, in 1696, the sitting member died after the election, and before the petition against his election was presented. When the Committee of elections proceeded upon the cause, they made the petitioner prove, that he had given notice to the electors in opposition to him, of the time appointed for trying the petition. However, nobody appearing to support the election of the deceased member, the Committee proceeded *ex parte*, and determined the petitioner to be duly elected. But this course of proceeding was disliked by the House; for as soon as the chairman had reported the case, a resolution immediately passed for *recommitting the merits of the election*. (See 11 Journ. 603.) Upon the second hearing in consequence of this resolution, the cause of the deceased member was supported before the Committee, and in conclusion they resolved, that he had been duly elected, with which the House afterwards agreed. See p. 690. in the same vol.

In the case of Shrewsbury, in 1774, (1 Doug. Elect. 461, 462.) Mr. Pulteney petitioned against both sitting members; before the time appointed for trial, one of them (Lord Clive) died. Mr. Pulteney afterwards had leave to withdraw his petition. The cause heard before the Committee, was between the electors and Mr. Leighton the other sitting member, against whom alone they had petitioned; but certainly, if Mr. Pulteney's petition had not been withdrawn, the Committee must have received parties to support Lord Clive's election.

In the case of Milbourn Port, in 1708, (16 Journ. 12.) a petition was presented and read; after which, the House was informed that the petitioner was dead,
and

and had intended before his death to drop the petition. But the House, even then, did not reject the petition, but ordered it to *lie on the table*. So in the case of Callington, they did no more than *discharge the order* for taking the petition into consideration; after which, it would have been competent, if circumstances should have made it necessary, to have passed a new order for the same purpose.

The argument of the counsel in p. 428. "that it is a greater offence in a member than in a stranger, to disobey the orders of the House," is certainly just; but then it should be considered that the House has a controul over its own Members, which it does not possess over strangers, and can inflict other punishments upon them for contempts, besides that of exclusion from their seats, which should be used only in the last resort. With respect to *petitioners*, it is perhaps the *only* effectual method to insure their obedience to the order.

P. 447. (K.) The report of this resolution occasioned an irregular debate in the House. Some members pointed out its defect in not determining upon the election of the other candidates; because, though Mr. Potter's election was declared void, it might not be necessary to issue out a new writ, till it was known whether Sir Robert Smyth had been duly elected, or not; and a member who spoke in this debate, doubted whether the Committee should not be resumed for ascertaining this fact.

It must be allowed, that the resolution, as reported to the House, is not in form explicit enough; but when it is considered that the petition complained of Mr. Potter's election *only*, and that there could be no question before the Committee but as between Sir Robert Smyth and him, there can be little doubt, but that
the

the report of a void election as to Mr. Potter, authorized the House, to issue a new writ. If the House had doubted upon the question, perhaps they might, under the words of Stat. 10 Geo. III. ch. 16. s. 18*, have directed the Committee to be resumed, for the purpose of making a more particular report; but this point may be questionable. The method which seems more regular in such case, would be to order the proceedings of the Committee to be laid before the House.

In the debate upon this question, the case of St. Ives, in 1775, was alluded to (See 2 Doug. Elect. 398. and 35 Journ. 357.) as containing a report from the select Committee, defective in the same point as this of Colchester; but it was said, that there, the several resolutions *taken together*, plainly pointed out the propriety of a new writ. The petition in that case was against *both* sitting members; the Committee determined one to be duly elected, the other not, and the election to be void "with respect to *one* of the burgesses;" whereas they ought, according to the accustomed form, to have named that *one*.

In the case of Shaftesbury, (18 Journ. 72, 74.) which was heard at the bar of the House, a defect of this kind having been made in the final resolutions, there is a special entry in the Journal of a subsequent day, before the ordering of a new writ, in the following words:

* ——— "the House on being informed of the Committee's determination by their chairman, shall order the same to be entered in their Journals, and give the *necessary directions* for confirming or altering the return, or for the issuing a new writ for a new election, or for carrying the said determination into execution, *as the case may require.*"

"The

“ The House, having upon the hearing of the merits of the election for the borough of Shaftesbury
 “ ——— at the bar of this House, upon tuesday last,
 “ adjudged only one burgeses to be duly elected for the
 “ said borough ;

“ Ordered, &c.”

In general, there is no preface to the order of a new writ. In the case of Coventry, 22 Journ. 819. the resolution was the same as the present, and the House ordered a new writ without any question, and without any introductory entry to the order. But this case was also heard before the House.

The debate above-mentioned was soon concluded by an intimation from the Speaker, that it was improper, *in the House*, to enter into a consideration of what might have passed in the select Committee ; the question was then put upon a motion which had been made by the chairman, for ordering a new writ in the room of Mr. Potter, which passed *nemine contradicente*,

NOTES

The first thing I noticed when I stepped out of the train at the station was the cold. It was a sharp contrast to the warm, humid air of the South. I had heard that the weather in the North was harsh, but I didn't realize it would be so different. The people here seemed so different too. They were so polite, so reserved. It was a complete change from the people I had grown up with. I had heard that the North was a land of freedom, but I didn't realize it would be so different. The people here seemed so different too. They were so polite, so reserved. It was a complete change from the people I had grown up with. I had heard that the North was a land of freedom, but I didn't realize it would be so different. The people here seemed so different too. They were so polite, so reserved. It was a complete change from the people I had grown up with.

VII.

T H E

C A S E

Of the BOROUGH of

Ivelchester, otherwise Ilchester,

In the County of SOMERSET.

The Committee was chosen on Tuesday, the 29th of June, and consisted of the following Members :

John Baring Esq; Chairman.

Thomas Powis, Esq; } Nominees appointed by the Com-
Earl of Mornington. } mittee, according to 11 Geo. III.
ch. 42. s. 6.

Sir William Mansel, Bart.

John Langston, Esq;

Philip Metcalf, Esq;

George Osbaldiston, Esq;

Charles Lefevre, Esq;

John Moore, Esq;

Hon. Richard Howard.

Henry James Pye, Esq;

Barne Barne, Esq;

Alexander Hood, Esq;

Sir Charles Kent, Bart.

Thomas B. Parkyns, Esq;

PETITIONERS,

Sir Samuel Hannay, Bart. and John Harcourt, Esq;
and certain Electors of the Borough of Ilchester.

SITTING MEMBERS,

Peregrine Cust, and Benjamin Bond Hopkins, Esqrs;

COUNSEL,

For the Candidates Petitioners,
Mr. Batt, and Mr. Lawrence.

For the Electors,
Mr. Franklin.

For Mr. Cust,
Mr. Piggott, and Mr. Partridge.

For Mr. Hopkins,
Hon. Mr. Erskine, and Mr. G. Bond.

T H E
C A S E

Of the BOROUGH of

I L C H E S T E R.

THE petition of Sir Samuel Hannay and Mr. Harcourt contained a charge of bribery against the sitting members, previously to and during the election; and that the returning officer had admitted many persons to vote for them who had no right; by which means they had procured a colourable majority, and were returned in prejudice of the petitioners, who had the majority of legal votes.

The petition of the electors contained similar charges against the sitting members*.

* Votes, 25 May, p. 23, 24.

There

There is no resolution of the House ascertaining the right of election in this borough: It has been understood to be in the bailiff, capital burgesses, and inhabitants, not receiving alms*. On the present occasion, *inhabitants* were explained to be *householders*, *legally settled* in the borough; in this both parties agreed.

The numbers on the poll were,

For Cust	95
Hopkins	89
Harcourt	70
Hannay	58

The counsel for the petitioners proposed not only to avoid the election of the sitting members for bribery, but also to disqualify so many of their votes on account of bribes received by the voters, and by other objections, as would prove the legal majority to be in favour of their clients, and give them the seats.

The trial lasted from the 30th of June, (the day in which the cause was opened) to

* See 14 Journ. 147. and 3 Doug. Elect. 153, 154.
the

the 21st of July. The greater part of this time was employed in hearing evidence. The question consisted entirely of fact; for which reason, and because the final decision contained no opinion upon the legal effect of the evidence, I have not pretended to give more than a general view of it.

The ground-work of the petitioners' case, as related by the witnesses, was as follows:

In October 1782, at which time a dissolution of Parliament was expected in many places, a general distribution of money was made to the voters on three successive days, at the House of a Mr. Lockyer, a gentleman of great property in the borough and its neighbourhood: The manner of doing it was this: The voters were invited to Lockyer's House (which was inhabited by one of his relations) and when assembled in the court-yard, were admitted one by one into the garden, by a man disguised in a woman's dress, and directed to go to a window of the House; from this window, a hand (no other part of the person being visible) distributed to every one the sum of 30l. Many of the voters were Lockyer's

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tenants,

tenants, and these received in stead of so much money, a discharge for rent then due, with as much money besides as made the whole present amount to 30 l.

The distribution on the third day was made with more distinction ; a list of those who had been omitted on the two first, was marked by Lockyer upon an inquiry into their circumstances : He expunged from it a pauper, and an exciseman, because they would have no votes, and others for different reasons, and the next money was given according to the list so corrected.

Besides this distribution, some voters who were not mixed with the herd in the garden, received letters by the post from London inclosing bank notes for 30 l. and others received notes of that amount privately from an agent of Lockyer's and Cust's.

This was the principal fact of bribery : A great deal of evidence was produced to shew that this distribution of money, actually procured success to the sitting members at the last election ; from whence it was argued, that their seats being *gained by corruption*, whether *their* act or not, could not be maintained : — To shew likewise
that

that these presents were not retrospective, for *past* favours in the preceding general election, but prospective and with a view to the next election, whenever that might come: — Likewise to connect the fitting members with this alledged bribery; Cust, by a participation in the presents of 30 l. and Hopkins (who had nothing to do with the borough till the week before the election) by becoming accessary after the fact to all Lockyer's conduct; by canvassing upon his recommendation with his agents and tenants, and by an avowed acquiescence in the effect of his money so distributed.

Evidence was also produced to prove personal acts of bribery at the time of the election by each of the fitting members.

It seemed to me, that the petitioners made no great account of any other objections to the fitting members' votes besides that of bribery; upon this subject, their evidence (if believed and allowed) extended to a number more than sufficient to have reduced the votes for the fitting members to a minority.

Mr. Cust's defence consisted in a denial of any participation in the presents of 30*l*. and in shewing that, if he were concerned in it, it was retrospective and not criminal; and that it had no effect upon this election.

Mr. Hopkins, besides this mode of justification, disclaimed all connection with the conduct both of Cust and Lockyer, as far as either might have affected the election.

The Committee determined in favour of the sitting members. Their opinion therefore may have been, either that the distribution of the money in 1782, under all the circumstances, was not bribery, or not such as to affect the election in 1784; or, that the proof did not sufficiently connect the sitting members with the transactions mentioned. They must at the same time have disbelieved the evidence of the personal acts of bribery.

The final resolutions were reported to the House on the 21st of july*.

* Votes, p. 455.

☞ When this Committee was appointed in the House, the appearance of the sitting members as separate parties by different counsel, occasioned an application from the Speaker to the counsel for the petitioners, to know if they objected to it; the latter said they relied upon the candour of the other counsel, who had alledged a real separation of interests between the two sitting members in their defence*: Accordingly they struck out separately from the list of forty nine members in forming the Committee†. The petitioning electors did not pretend to separate their interest from that of their candidates.

In the beginning of this cause, the questions of evidence so often debated in Committees where bribery has made part of the inquiry, respecting *agency*‡, were agitated by the counsel. The Committee laid down a rule upon this subject, con-

* See 1 Doug. Elect. 86. † According to sect. 6. of 11 Geo. III. ch. 42.

‡ See the cases of Bristol, Hindon, Shaftesbury, Worcester and Ilchester, in Doug. Elect.

formable to that practised in the case of Ilchester, 3 Doug. Elect. 161-2. where the Committee proceeded upon a consideration of the practice in many former cases. This rule was, upon questions concerning the acts of a supposed agent, not to insist upon proof of his being an agent, *previous* to the inquiry into his acts.

On the 16th of July the chairman, by the direction of the Committee, reported to the House, that one Thomas Withy (a witness called on the part of Mr. Cust) had grossly prevaricated in giving his evidence to the Committee: The Journal of 27th Nov. 1775 *, was referred to by the House for a precedent, and read, and an order passed for committing Withy to Newgate †. That precedent had been made upon the authority of one of the same sort, in the case of Milborne Port in 1772 ‡.

Withy afterwards petitioned the House to forgive him, and was discharged on the

* 35 Journ. 462. and 3 Doug. Elect. 166. Case of Ilchester. † Votes, p. 422. ‡ 33 Journ. 746, and 1 Doug. Elect. 88.

22d of july, the day after the conclusion of the cause; the House being informed of his ill state of health, and that his life was in danger *.

☞ On the 10th of july, when the petitioners closed their case, the counsel for Mr. Hopkins mentioned to the Committee a few of the principal circumstances of their case, and asked permission to absent themselves from the court, while Mr. Cust's counsel were going through his defence, which, they said, had no relation to, and could not affect Mr. Hopkins; they proposed this in order to relieve their client from a great deal of unnecessary expence and trouble. The counsel for the petitioners objected to this proposal, as a scheme to obtain a partial opinion from the Committee in favour of Mr. Hopkins; and the Committee hereupon asked Mr. Cust's counsel, if they had any objection to Mr. Hopkins's going through his case first, as it was likely to be much shorter than the other; to this the counsel begged leave to

* Votes, p. 436, 460.

decline

decline answering, and here the matter ended. However, on the next day, and during the whole time employed in Mr. Cuff's defence, Mr. Hopkins, his counsel and agent, did not appear in court.

I do not recollect that in any of the election Committees, it has ever been necessary to determine the respective precedence of the fitting members; it might perhaps have been so in this case, if Mr. Hopkins had disputed Mr. Cuff's claim of priority in the defence. If the question were to arise, perhaps the rule of the House respecting double returns* would furnish a proper guide to the decision; by analogy to this rule, the member first named in the petition should have the precedence. This seems a more certain method than one I have heard suggested, for ranking the parties according to the professional rank of their counsel.

* See before p. 76.



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